DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 13-115
Title: Tim Wood and Rob Savage, Petitioners
v.
Michael Moss, et al.
Docketed: July 26, 2013
Linked with 12A1096
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (10-36152, 10-36172)
Decision Date: April 9, 2012
Rehearing Denied: February 26, 2013
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
May 15 2013	Application (12A1096) to extend the time to file a petition for a writ of certiorari from May 27, 2013 to June 27, 2013, submitted to Justice Kennedy.
May 16 2013	Application (12A1096) granted by Justice Kennedy extending the time to file until June 27, 2013.
Jun 11 2013	Application (12A1096) to extend further the time from June 27, 2013 to July 26, 2013, submitted to Justice Kennedy.
Jun 20 2013	Application (12A1096) granted by Justice Kennedy extending the time to file until July 26, 2013.
Jul 26 2013	Petition for a writ of certiorari filed. (Response due August 26, 2013)
Aug 7 2013	Order extending time to file response to petition to and including September 25, 2013.
Aug 12 2013	Waiver of right of respondents Ron Ruecker, Eric Rodriquez, Tim R. McClain and Randie Martz to respond filed.
Sep 16 2013	Order further extending time to file response to petition to and including October 25, 2013.
Oct 24 2013	Brief of respondents Michael Moss, et al. in opposition filed.
Nov 12 2013	DISTRIBUTED for Conference of November 26, 2013.
Nov 13 2013	Reply of petitioners Tim Wood and Rob Savage filed. (Distributed)
Nov 26 2013	Petition GRANTED.
Dec 13 2013	Motion to dispense with printing the joint appendix filed by petitioners Tim Wood and Rob Savage.
Jan 8 2014	SET FOR ARGUMENT ON Wednesday, March 26, 2014
Jan 10 2014	Brief of petitioners Tim Wood and Rob Savage filed.
Jan 13 2014	Motion to dispense with printing the joint appendix filed by petitioners

	GRANTED.
Jan 13 2014	Record received from U.S.C.A. 9th Circuit. The record is electronic.
Jan 16 2014	Record received from U.S.D.C. of Oregon. 1 Envelope.
Jan 17 2014	Brief amici curiae of National Conference of State Legislatures, et al. filed.
Jan 17 2014	Brief amicus curiae of Public Justice, P.C. in support of neither party filed.
Feb 3 2014	CIRCULATED.
Feb 10 2014	Brief of respondents Michael Moss, et al. filed. (Distributed)
Feb 18 2014	Brief amici curiae of Professors of Civil Procedure filed. (Distributed)
Feb 18 2014	Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc. filed. (Distributed)
Mar 12 2014	Reply of petitioners Tim Wood and Rob Savage filed. (Distributed)
Mar 26 2014	Argued. For petitioners: Ian H. Gershengorn, Deputy Solicitor General, Department of Justice, Washington, D. C. For respondents: Steven M. Wilker, Portland, Ore.
May 27 2014	Judgment REVERSED. Ginsburg, J., delivered the opinion for a unanimous Court.

PETITION FOR WRIT OF CERTIORARI

13-115

No.

In the Supreme Court of the United States

TIM WOOD AND ROB SAVAGE, PETITIONERS

v.

MICHAEL MOSS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are Secret Service agents who, while protecting President George W. Bush, are alleged to have required that a group of 200 to 300 anti-Bush demonstrators be moved away from an alley next to an outdoor patio where the President was making a last-minute, unscheduled stop to dine. After they were moved, the anti-Bush demonstrators were less than one block farther from the alley than a group of pro-Bush demonstrators (who had not been adjacent to the alley at the outset). They were also two blocks farther from the route that the President's motorcade subsequently took when he left the restaurant. The court of appeals held that petitioners are not entitled to qualified immunity from a claim under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), of viewpoint discrimination in violation of the First Amendment. The questions presented are as follows:

1. Whether the court of appeals erred in denying qualified immunity to Secret Service agents protecting the President by evaluating the claim of viewpoint discrimination at a high level of generality and concluding that pro- and anti-Bush demonstrators needed to be positioned an equal distance from the President while he was dining on the outdoor patio and then while he was travelling by motorcade.

2. Whether respondents have adequately pleaded viewpoint discrimination in violation of the First Amendment when no factual allegations support their claim of discriminatory motive and there was an obvious security-based rationale for moving the nearby anti-Bush group and not the farther-away pro-Bush group.

PARTIES TO THE PROCEEDING

Petitioners Tim Wood and Rob Savage were defendants-appellants in the court of appeals.

Ron Ruecker, Eric Rodriguez, Tim F. McClain, and Randie Martz were defendants-appellants in the court of appeals.

Michael Moss, Lesley Adams, Beth Wilcox, Richard Royer, Lee Frances Torelle, Mischelle Elkovich, Anna Vine (formerly known as Anna Boyd), and the Jackson County Pacific Green Party were plaintiffs-appellees in the court of appeals.

Several other individuals and entities were defendants in the district court but did not file notices of appeal and were neither appellants nor appellees in the court of appeals. See App., *infra*, 1a-3a.

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In the Supreme Court of the United States

No.

TIM WOOD AND ROB SAVAGE, PETITIONERS

v.

MICHAEL MOSS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Tim Wood and Rob Savage, two agents of the United States Secret Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, as modified upon denial of rehearing en banc (App., *infra*, 1a-59a), is reported at 711 F.3d 941. The order of the district court and the recommendation and report of the magistrate judge (App., *infra*, 60a-157a) are reported at 750 F. Supp. 2d 1197. The opinion of the court of appeals following an earlier appeal is reported at 572 F.3d 962. The previously appealed order of the district court, and the recommendation and report of the magistrate judge, are unreported but available at 2007 WL 2915608.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2012. A petition for rehearing was denied on February 26, 2013 (App., *infra*, 8a). On May 16, 2013, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including June 27, 2013. On June 20, 2013, Justice Kennedy further extended the time to July 26, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law * * * abridging the freedom of speech."

STATEMENT

As relevant to this petition, this is a suit brought by seven of respondents under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The suit was filed against petitioners, two individual agents of the United States Secret Service, for actions they allegedly took while serving on a protective detail for the President of the United States. In 2009, the court of appeals reversed the district court's initial denial of petitioners' motion to dismiss. See *Moss* v. *United States Secret Serv.*, 572 F.3d 962 (9th Cir.) (*Moss I*). After remand, however, plaintiffs filed an amended complaint (App., *infra*, 158a-222a), and the district court denied in relevant part petitioners' motion to dismiss on qualified-immunity grounds (*id.* at 89a-121a). That decision was affirmed by the court of appeals (*id.* at 33a-50a), which also denied rehearing en banc (*id.* at 8a) over the dissent of eight judges (*id.* at 8a-23a).

1. On the evening of October 14, 2004, President Bush was expected to stay at a cottage located a short distance from the Jacksonville Inn in Jacksonville, Oregon. App., *infra*, 24a-25a. Seven of respondents were among a group of 200 to 300 anti-Bush demonstrators who had assembled on the street and sidewalks in the block of California Street immediately adjacent to the Inn, while a group of pro-Bush demonstrators had assembled in the next block.[1] *Ibid.*; see *id.* at 212a (map of the Inn's vicinity, including the demonstrators' initial locations). After the two groups had assembled, the President decided to make a previously unscheduled stop to dine on an outdoor patio at the Inn. *Id.* at 25a. As relevant here, the gravamen of the Second Amended Complaint (*id.* at 158a-222a) is that petitioners engaged in unconstitutional viewpoint discrimination by requiring respondents to be moved away from the alley leading to the President's dining area. After they were moved, respondents (and the other anti-Bush demonstrators) were farther from the President than the pro-Bush demonstrators (who were farther from that alley at the outset); farther from the President than diners and guests at the Inn; and farther from the President's motorcade when it departed the Inn than were the pro-Bush demonstrators. See *id.* at 36a-43a & n.5.

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[1] Respondents in this Court include the anti-Bush demonstrators, the Jackson County Pacific Green Party, and state police officers. See Sup. Ct. R. 12.6; App., *infra*, 1a-3a (caption identifying parties to the proceeding in the court of appeals). Because the court of appeals instructed the district court to dismiss the claim appealed by the state police officers (*id.* at 58a), and because the Jackson County Pacific Green Party did not join the *Bivens* claim against petitioners (*id.* at 198a-199a), this petition henceforth uses the term "respondents" to refer to the seven individual anti-Bush demonstrators who were plaintiffs-appellees in the court of appeals. See p. II, *supra*.

Respondents allege that petitioners "were Secret Service agents at the scene of the demonstration" who were "assigned to provide security for the President." App., *infra*, 165a. Just before the President arrived at the Inn, state and local police officers, acting on Secret Service direction, cleared the alley next to the Inn and prevented those in front of the Inn from crossing the street or leaving the sidewalks. *Id.* at 175a-176a. Guests and diners already at the Inn and restaurant patio were allowed to remain. *Id.* at 177a.

The complaint alleges that, when the President arrived at the Inn, the assembled groups of anti- and pro-Bush demonstrators "had equal access" to him because both groups were on California Street but on opposite sides of Third Street. App., *infra*, 174a-175a. Shortly after the President arrived at the outdoor patio behind the Inn, however, the Secret Service agents directed state and local police to "clear California Street of all persons between Third and Fourth Streets"—the block immediately adjacent to the alley leading to the patio—by "mov[ing] them to the east side of Fourth Street and subsequently to the east side of Fifth Street." *Id.* at 177a. Respondents allege that police officers "us[ed] clubs, pepper spray bullets, and forceful shoving" to move them. *Id.* at 180a.

Respondents allege that the "agents told [the police] that the reason for the Secret Service's request or direction was that they did not want anyone within handgun or explosive range of the President." App., *infra*, 177a. Respondents claim that this "assertion was false * * * because there was no significant security difference between the two groups of demonstrators." *Id.* at 177a-178a. In respondents' view, if that security rationale had been the agents' actual reason for moving the anti-

Bush demonstrators, petitioners "would have requested or directed that all persons dining, staying at, or visiting the Inn who had not been screened * * * be removed from the Inn," and would also "have requested or directed that the pro-Bush demonstrators * * * be moved further to the west so that they would not be in range of the President as [his motorcade] travelled from the Inn to the" nearby cottage where he would spend the night. *Id.* at 178a.

Respondents acknowledge that the Secret Service has promulgated "written guidelines, directives, instructions and rules" that prohibit discrimination against demonstrators on the basis of their speech. App., *infra*, 184a. Respondents allege, however, that those documents "do not represent the actual policy and practice of the Secret Service." *Ibid.* They further allege that the Secret Service has a history of "discriminating against First Amendment expression," *id.* at 181a (capitalization modified), and that "[t]he White House under President George W. Bush * * * sought to prevent or minimize the President's exposure to dissent or opposition during his public appearances and travels," *id.* at 182a-183a. In support of that allegation, respondents invoke portions of a manual for the White House Advance Team and published reports of "numerous other occasions" on which the Secret Service purportedly sought to shield President Bush from "anti-government expressive activity." *Id.* at 189a-194a, 213a-217a. They allege that petitioners' actions "on October 14, 2004, were an implementation of this actual policy and practice" of viewpoint discrimination in violation of the First Amendment. *Id.* at 185a-186a.

With respect to petitioners, the Second Amended Complaint's first claim for relief alleges a violation of

respondents' First, Fourth, and Fifth Amendment rights. App., *infra*, 198a.[2] On that claim, respondents seek compensatory and punitive damages, pre- and post-judgment interest, costs, and attorney's fees. *Id.* at 199a-201a, 205a-207a, 210a.

2. In 2007, the district court dismissed most of the claims against petitioners and other defendants that respondents had asserted in an earlier version of their complaint. App., *infra*, 66a-67a. The court denied petitioners' motion to dismiss the First Amendment claim against them, however, and denied their defense of qualified immunity. *Id.* at 67a-68a. On petitioners' interlocutory appeal, the court of appeals in *Moss I* reversed the district court's denial of petitioners' motion to dismiss the First Amendment claim against them on qualified-immunity grounds, concluding that "[t]he factual content contained within the complaint does not allow us to reasonably infer that [petitioners] ordered the relocation of [respondents'] demonstration because of its anti-Bush message." 572 F.3d at 972. On remand, respondents filed their Second Amended Complaint, and petitioners (and other defendants) again filed motions to dismiss on qualified-immunity and other grounds. App., *infra*, 71a.

In 2010, the district court, adopting the report and recommendation of the magistrate judge, granted the motions to dismiss in part and denied them in part. App., *infra*, 60a-62a. With respect to respondents' "claims for First Amendment violations against [petitioners]," the court found that the Second Amended Complaint "meets the stricter pleading standards im-

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[2] The other claims in the complaint—against state and local officials and entities, against other Secret Service defendants, and against petitioners in their official capacity—are not at issue in this Court.

posed by [*Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009)]." App., *infra*, 61a; see *id.* at 89a-114a. The court also held that petitioners "have not shown, at least at this stage of the litigation, that they are entitled to qualified immunity." *Id.* at 61a; see *id.* at 114a-121a.

3. Petitioners again filed an interlocutory appeal. This time, however, the court of appeals affirmed in relevant part. App., *infra*, 1a-59a.

a. The court of appeals recognized that government officials cannot be denied qualified immunity at the pleading stage unless (1) the plaintiffs have alleged facts that "make out a violation of a constitutional right," and (2) "the right at issue was clearly established at the time of [the] defendant's alleged misconduct." App., *infra*, 31a-32a (quoting *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009)) (alteration in quotation).

b. Turning to the claim in question, the court of appeals stated that "[a] restriction on speech is viewpoint-based if (1) on its face, it distinguishes between types of speech or speakers based on the viewpoint expressed; or (2) though neutral on its face, the regulation is motivated by the desire to suppress a particular viewpoint." App., *infra*, 35a. The court first found that respondents have adequately alleged facial viewpoint discrimination. *Id.* at 37a. The court explained that, after the anti-Bush group was moved, those demonstrators were "more than a block farther from where the President was dining than [were] the pro-Bush demonstrators, and, one can infer, were therefore less able to communicate effectively with the President, media, or anyone else inside or near the Inn." *Ibid.* The court also found it "critical[]" that, as a result of the move, "the anti-Bush protestors were two blocks away from the [post-dinner] motorcade

route, while the pro-Bush demonstrators remained along it." *Ibid.* The court dismissed petitioners' contention that the President's "armored limousine" "had far greater security than the open-air patio where the President dined," stating that this contention "rests on facts outside of the complaint" and that "a viewpoint-neutral rationale cannot transform a facially discriminatory policy * * * into a valid one." *Id.* at 37a-38a.

The court of appeals further held that respondents have adequately alleged that petitioners "acted with an impermissible motive of shielding the President from those expressing disapproval of him or his policies." App., *infra*, 38a. The court concluded that respondents have "plead[ed] facts that make plausible their claim that they were moved because of their viewpoint—that the security rationale, if indeed offered by the agents at all, was pretextual." *Id.* at 39a. That conclusion was based on respondents' "asser[tion]" that, because they were separated from the outdoor patio by a six-foot-high fence and from the alley by police officers clad in riot gear, "they posed no threat to the President, and there was thus no reason for them to be moved from their initial location." *Id.* at 40a. The court also concluded that the Second Amended Complaint "elaborates in much more detail" on respondents' allegation of the Secret Service's "'officially authorized pattern and practice' of shielding the President from dissent," an allegation the court in *Moss I* had found to be merely conclusory in the First Amended Complaint. *Id.* at 41a. The additional detail came in the form of 12 "similar instances of viewpoint discrimination against protestors expressing negative views of the President," as well as excerpts from a Presidential Advance Manual which "direct[] the President's advance team to 'work with the

Secret Service * * * to designate a protest area * * *, preferably not in view of the event site or motorcade route.'" *Id.* at 41a-42a (emphasis omitted).

c. The court of appeals further held that petitioners are not entitled to qualified immunity. App., *infra*, 43a-47a. The court reiterated that the anti-Bush group was "moved over a block farther from the Inn than the pro-Bush demonstrators," and that "based on the facts alleged, there are relevant ways" in which the two groups' "distances [from the President while he was dining] were not comparable." *Id.* at 44a. The court also found it "quite relevant" that "the pro-Bush demonstrators were permitted to remain along the President's motorcade route, while the anti-Bush protestors were kept away." *Ibid.* The court stated that, taking respondents' "allegation of discriminatory motive as true, it is clear that no reasonable agent would think that it was permissible under the First Amendment to direct the police to move protestors farther from the President because of the critical viewpoint they sought to express." *Id.* at 45a; see *ibid.* (finding it "'beyond debate' that, particularly in a public forum, government officials may not disadvantage speakers based on their viewpoint") (quoting *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2083 (2011)).

d. In response to a dissent from denial of rehearing en banc (discussed below), the court of appeals amended its opinion to expand its discussion of qualified immunity. App., *infra*, 4a-7a, 47a-50a. The court stated that "any explanation for the agents' differential treatment of the pro-[ ]and anti-Bush demonstrators would have to be so obviously applicable as to render the assertion of unconstitutional viewpoint discrimination implausible." *Id.* at 47a. The court believed, however, that "there is simply *no* apparent explanation for why the Secret Ser-

vice agents permitted only the pro-Bush demonstrators, and not the anti-Bush protestors, to remain along the President's after-dinner motorcade route." *Ibid.* The court rejected the suggestion that "the pro-Bush demonstrators were not moved because they were ostensibly further than the protestors from the patio where President Bush was dining." *Ibid.* In the court's view, that explanation was "non-responsive" to the fact that the anti-Bush group was moved "a considerable distance, to a location" that was "not comparable to the place where the pro-Bush group was allowed to remain." *Id.* at 48a (internal quotation marks omitted).

Finally, the court of appeals viewed decisions like *Hill* v. *Colorado*, 530 U.S. 703 (2000), which have upheld "certain buffer zones" near abortion clinics, as illustrating why respondents have alleged "a plausible claim of a violation of clearly established law regarding impermissible viewpoint discrimination." App., *infra*, 49a. The court had "no doubt" that any ordinance "establish[ing] a one-hundred foot buffer zone for pro-abortion demonstrators and a three-hundred foot buffer zone for anti-abortions protestors" would have been "summarily invalidated." *Ibid.* The court believed that respondents have "plausibly allege[d] just such a significant *difference* in the buffer zone in a public forum." *Id.* at 50a.

4. Petitioners sought rehearing en banc, which the court of appeals denied. App., *infra*, 8a. In an opinion joined by seven other judges, Judge O'Scannlain dissented from the denial of rehearing. *Id.* at 8a-23a. In the dissenters' view, the court of appeals' opinion "once again commits many familiar qualified immunity errors" by, *inter alia*, "afford[ing] unwarranted deference to legal conclusions in [respondents'] complaint" and "defin[ing] the right at issue too broadly." *Id.* at 22a;

see *id.* at 12a-15a, 15a-18a. In light of the complaint's cognizable factual allegations, the dissenting judges concluded that two legal propositions were not clearly enough established for respondents to defeat petitioners' claim of qualified immunity. *Id.* at 18a. First, the dissenters found that moving respondents "to a location one block farther from the President than [the pro-Bush demonstrators] when creating a Presidential security perimeter" did not violate any clearly established First Amendment right because "before this decision, no law appeared to require Secret Service agents to ensure that groups of differing viewpoints were positioned in locations exactly equidistant from the President at all times." *Id.* at 18a, 19a. Second, the dissenters stated that it "seems absurd" to construe the First Amendment as requiring Secret Service agents "to return a group of demonstrators to their original location before the President could leave in his motorcade." *Id.* at 20a.

The dissenting judges concluded that the court of appeals' decision "renders the protections of qualified immunity toothless" and "hamstrings Secret Service agents, who must now choose between ensuring the safety of the President and subjecting themselves to First Amendment liability." App., *infra*, 22a-23a. Recognizing that the Ninth Circuit's "track record in deciding qualified immunity cases is far from exemplary," the dissenters expressed "concern[]" that, "with this decision, * * * our storied losing streak will continue." *Id.* at 22a (citing four qualified-immunity cases in which this Court has reversed the Ninth Circuit).

REASONS FOR GRANTING THE PETITION

As the eight judges who dissented from the denial of rehearing en banc recognized, the court below "commit[ted] many familiar qualified immunity errors."

App., *infra*, 22a. Most egregiously, the court disregarded this Court's repeated admonitions against "defin[ing] clearly established law at a high level of generality." *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011). The Ninth Circuit's application of First Amendment and qualified-immunity principles is in significant tension with a recent decision of the Tenth Circuit, which recognized the challenges faced by Secret Service agents dealing with multiple groups of demonstrators near the President.

Respondents allege two distinct (though complementary) theories in support of their claim of unconstitutional viewpoint discrimination. See App., *infra*, 35a. First, respondents allege that petitioners' "actions were facially viewpoint discriminatory" because "the agents explicitly treated pro- and anti-Bush demonstrators differently" by allowing the former to remain in closer proximity to the President. *Ibid.* In a multitude of circumstances, however, legitimate crowd-control measures may have the practical effect of placing different speakers expressing different views at different distances from the President or other high-level officials whom Secret Service agents are assigned to protect. Nothing in this Court's decisions even suggests, much less clearly establishes, that such disparate impact standing alone violates the First Amendment.

Second, respondents allege that petitioners' "actions, even if facially neutral, were motivated by an impermissible purpose to discriminate against the anti-Bush viewpoint [respondents] expressed." App., *infra*, 35a. When the defendant's invidious motive is a necessary element of a constitutional claim, however, the plaintiff cannot defeat a motion to dismiss simply by alleging in conclusory terms that the defendant acted with the

requisite unlawful motive. Rather, the plaintiff must allege specific facts that, taken as true, raise a sound inference of unconstitutional motivation. Respondents did not satisfy that requirement here. The court of appeals found respondents' factual allegations sufficient only by effectively requiring petitioners to negate the *possibility* of invidious intent. This Court has made clear, however, that even when unconstitutional motive is a *conceivable* explanation for the facts alleged in a plaintiff's complaint, a motion to dismiss should be granted if a *more likely* innocent explanation for the alleged facts exists.

The Ninth Circuit's errors are sufficiently important to warrant this Court's review because of the particular threats that the decision below poses to the sensitive and important work of the Secret Service in protecting high-level officials. Indeed, as in previous qualified-immunity cases from the Ninth Circuit—including one involving Secret Service agents—summary reversal would be appropriate. See *Brosseau* v. *Haugen*, 543 U.S. 194 (2004) (per curiam); *Hunter* v. *Bryant*, 502 U.S. 224 (1991) (per curiam).

A. The Court Of Appeals Erroneously Defined The Right Against Viewpoint Discrimination At A High Level Of Generality, Without Accounting For The Specific Context Of The Allegations In This Case

The court of appeals held that petitioners are not entitled to qualified immunity on respondents' claim, under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), of viewpoint discrimination in violation of the First Amendment.[3]

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[3] This Court has "never held that *Bivens* extends to First Amendment claims." *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 n.4

That claim is based on actions that petitioners allegedly took while protecting the President. The decision below flouts this Court's repeated exhortations that, for purposes of qualified immunity, the court must consider the specific circumstances of the alleged violation rather than describing at an abstract or general level the constitutional right that is alleged to have been violated. The Ninth Circuit's error is highlighted by a recent Tenth Circuit decision, which dismissed a viewpoint-discrimination claim against a Secret Service agent in similar (though not identical) circumstances.

1. For the past 25 years, this Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality" in conducting qualified-immunity analysis. *Al-Kidd*, 131 S. Ct. at 2084; see *Brosseau*, 543 U.S. at 199, 201 (summarily reversing the Ninth Circuit for evaluating qualified immunity "at a high level of generality"); *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001) (reversing the Ninth Circuit because "whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals"); *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999) (explaining that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established"); *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987) (noting that evaluating a claim at an abstract level of generality would transform "a guarantee of immunity into a rule of pleading"). The Court

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(2012). No argument that *Bivens* remedies are unavailable in this context, however, was either pressed or passed upon in the court of appeals. For purposes of this petition, petitioners therefore assume that *Bivens* liability extends to First Amendment claims of viewpoint discrimination.

reiterated this precise point just last year. See *Reichle* v. *Howards*, 132 S. Ct. 2088, 2094 (2012) ("[T]he right in question is not the general right to be free from retaliation for one's speech, but the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause."); *id.* at 2094 n.5 ("[W]e do not define clearly established law at such a 'high level of generality.'") (quoting *al-Kidd*, 131 S. Ct. at 2084).

As the Court explained in *al-Kidd*, "[t]he general proposition * * * that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established." 131 S. Ct. at 2084. The same holds true for the viewpoint-discrimination claim at issue in this case. "[S]tating that the government cannot engage in viewpoint discrimination is just about as general as stating that the government cannot engage in unreasonable searches and seizures—an approach that is too general for the qualified immunity analysis." *Weise* v. *Casper*, 593 F.3d 1163, 1168 n.1 (10th Cir.), cert. denied, 131 S. Ct. 7 (2010).

The court below committed exactly that mistake, however, by defining the right alleged to have been violated as the right to be free of "viewpoint discrimination in a public forum." App., *infra*, 49a. The court ignored this Court's repeated admonitions that the pertinent constitutional right must be defined by reference to the specific context of the case, and that a right is clearly established for qualified-immunity purposes only if either "controlling authority" or "a robust 'consensus of cases of persuasive authority'" made clear that the defendant officer's own conduct was impermissible. *Al-Kidd*, 131 S. Ct. at 2084 (quoting *Wilson*, 526 U.S. at 617). Instead, the court of appeals simply proclaimed,

without regard to context, that it is "'beyond debate' that, particularly in a public forum, government officials may not disadvantage speakers based on their viewpoint." App., *infra*, 45a.

When stated at that general and abstract level, the court of appeals' proposition is correct. But it is insufficient to establish that petitioners' own alleged conduct constituted impermissible viewpoint discrimination, much less that the illegality of that conduct was clearly established at the time petitioners acted. The proper question for qualified-immunity purposes is whether the "'contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Al-Kidd*, 131 S. Ct. at 2083 (quoting *Anderson*, 483 U.S. at 640) (alterations in original). In other words, it must be "clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Saucier*, 533 U.S. at 202 (emphasis added).

2. Until the court of appeals issued the decision below, no decision of this Court or of the Ninth Circuit had "appeared to require Secret Service agents to ensure that groups of differing viewpoints were positioned in locations exactly equidistant from the President at all times." App., *infra*, 19a (O'Scannlain, J., dissenting from the denial of rehearing en banc). Respondents seek to hold petitioners liable for (a) "moving one group to a location one block farther from the President than another when creating a Presidential security perimeter," and (b) declining "to move the group back to their original location before the President could leave in his motorcade." *Id.* at 18a. The court of appeals identified no sound reason for viewing that course of conduct as a constitutional *violation*, much less for regarding it as a violation of a *clearly established* constitutional

right. In particular, the general rule against "viewpoint discrimination" is of no help in determining whether the relatively trivial disparate impact alleged in this case violates the First Amendment.

The court of appeals identified no decisions indicating, in remotely similar contexts, that Secret Service agents have an affirmative First Amendment obligation to equalize the distances from the President of groups engaged in competing forms of expressive activity. Reasonable agents could have readily believed that it was permissible to move the anti-Bush group across Fifth Street without moving the pro-Bush group. The two groups posed different security concerns at the outset because the anti-Bush group was initially located significantly closer to, and at a site less screened from, the patio than was the pro-Bush group. Respondents' map makes clear that, even after the anti-Bush group was moved across Fourth Street, it was still closer to, and less screened from, the patio.[4] At that point, the decision to move the anti-Bush group another block across Fifth Street did result in its being less than one block farther from the President than the pro-Bush group.[5] But the ability of the law-enforcement officers

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[4] At the corner of Fourth and California Streets, the anti-Bush group was closer than the pro-Bush group to the California Street entrance of the alley leading to the patio. From that corner, there were also fewer physical obstacles between the anti-Bush group and the patio, because the "Sterling Savings" building on the corner of Fourth and California did not extend nearly as far north as the "US Hotel" building on the corner of Third and California (next to the pro-Bush group). See App., *infra*, 212a.

[5] The court of appeals described the anti-Bush group as being separated from the President "by more than a full square block[] and two roadways," and it characterized that distance as "more than a block farther * * * than the pro-Bush protestors." App., *infra*, 37a,

on the scene to engage in crowd control would be enhanced by using a cross-street as the line of demarcation, which could reasonably be thought to outweigh any desire to calibrate distances more precisely under the circumstances.

The court of appeals also attached substantial weight to the fact that moving the anti-Bush demonstrators away from the alley next to the outdoor patio while the President was dining later resulted in their being two blocks farther than the pro-Bush group from the post-dinner motorcade route. See App., *infra*, 37a-38a, 44a, 47a, 48a. The court cited no cases, however, suggesting that petitioners were required to let the anti-Bush group move back to Third Street before the agents allowed the President's motorcade to depart the Inn, simply to ensure that the pro- and anti-Bush groups were equidistant (as they had been when the motorcade initially arrived). In fact, respondents' complaint does not allege that the anti-Bush group had any reasonable opportuni-

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48a. That calculation is belied by respondents' own map, which reveals that the pro-Bush group was itself separated from the alley leading to the patio by most of one block and one roadway. *Id.* at 212a. Because that distance was *longer* than the distance from the alley to the east side of Fourth Street, the addition of precisely one more block (*i.e.*, the distance from the east side of Fourth Street to the east side of Fifth Street) necessarily resulted in a difference of less than one block between the two groups' distances from the alley. Since the pro-Bush group was itself nearly a block from the alley, the less-than-one-block difference casts serious doubt on the court of appeals' willingness to "infer" that the anti-Bush group was materially "less able" than the pro-Bush group "to communicate effectively with the President" while he was dining. *Id.* at 37a. So, too, does the failure of the Second Amended Complaint to remedy a pleading deficiency identified in *Moss I*: that respondents did not allege they had been "moved to an area where the President could not hear their demonstration." 572 F.3d at 971.

ty to move back to Third Street between the time when the President left dinner and the time when his motorcade traveled down that street; nor does it allege that the motorcade should have been required to wait for the protestors to move. That alone should suffice to answer the court of appeals' puzzlement about "why the Secret Service agents permitted only the pro-Bush demonstrators, and not the anti-Bush protestors, to remain along the President's after-dinner motorcade route." *Id.* at 47a.[6]

"[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Under the objective circumstances that petitioners faced, and given the comparatively small differences in the relative distances between the pro- and anti-Bush groups and the President, there is no sound reason to conclude that any First Amendment violation occurred, much less that petitioners violated any clearly established constitutional right. As in *al-Kidd*, "eight Court of Appeals judges" concluded that petitioners' alleged conduct was not illegal, which strongly bolsters their entitlement to qualified immunity. 131 S. Ct. at 2085; see *Wilson*, 526 U.S. at 618 ("If

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[6] Although the court of appeals described the D.C. Circuit's decision in *Mahoney* v. *Babbitt*, 105 F.3d 1452 (1997), as "closely on point," App., *infra*, 46a, the facts of *Mahoney* were quite different from the circumstances of this case. *Mahoney* involved concededly viewpoint-based decisions about whether to grant permits to demonstrators who wished to protest along an Inaugural Parade route. See 105 F.3d at 1455-1456. This case, by contrast, involves snap decisions about how, without the benefit of advance security work, to deal with two groups of demonstrators who were near an outdoor area where the President was dining.

judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.").

3. The Tenth Circuit recently rejected a viewpoint-discrimination claim involving a similar crowd-control situation. In *Pahls* v. *Thomas*, Nos. 11-2055 & 11-2059, 2013 WL 2398559 (10th Cir. June 4, 2013), a Secret Service agent was presumed to have known that anti-Bush protestors had been required by local police to be approximately 150 yards down a public road from a driveway that would be used by the President's motorcade; yet the agent allowed a group of Bush supporters to remain on private property at a location directly across the road from the driveway. *Id.* at *1, *22. In the course of reversing the denial of qualified immunity on summary judgment, the Tenth Circuit held that "[t]he First Amendment does not impose upon public officials an affirmative duty to ensure a balanced presentation of competing viewpoints." *Id.* at *23. Even though the Secret Service agent had allowed the Bush supporters to remain much closer than the protestors to the motorcade route, the court concluded that the First Amendment "did not impose upon him a corresponding duty to relocate Bush protesters to a more favorable location." *Ibid.* The involvement of local police in situating the anti-Bush protestors and the distinction between public and private property keep *Pahls* from being on all fours with this case. The Tenth Circuit's reasoning, however, further undermines the Ninth Circuit's suggestion that respondents had a clearly established constitutional right to be placed no further from the President than the pro-Bush demonstrators who were in the same general area.

B. The Court Of Appeals Erred In Holding That Respondents Adequately Pleaded The Discriminatory Motive Necessary For Their Claim Of Unconstitutional Viewpoint Discrimination

For the reasons stated above, respondents could not establish a violation of any clearly established constitutional right simply by proving that they were placed farther away from the President than were a competing group of demonstrators. Rather, a necessary element of respondents' viewpoint-discrimination claim is that they were placed at greater remove from the President *because of* the anti-Bush views they sought to express. In *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), this Court held that a complaint alleging discrimination in violation of the First Amendment (there, religious discrimination) must plead the defendant's discriminatory purpose or intent in factual, nonconclusory terms. *Id.* at 680-681.

The court below, however, effectively accepted the truth of respondents' conclusory allegations of discriminatory motive—allegations that, as the dissenters recognized, were "almost identical" with those in *Iqbal*. App., *infra*, 12a. As a result, the court of appeals "turn[ed] *Iqbal* on its head." *Ibid.* If the decision below is left uncorrected, it will be much more difficult for defendants in the Ninth Circuit to defeat claims involving allegations of illegal motive at the motion-to-dismiss stage, notwithstanding this Court's "repeated[]" emphasis on "the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009) (quoting *Hunter*, 502 U.S. at 227).

1. The complaint alleges that petitioners ordered "all persons" (a viewpoint-neutral category) to be moved from the block adjacent to the outdoor patio in order to

get them beyond "handgun or explosive range of the President" (a viewpoint-neutral justification). App., *infra*, 177a. Respondents nevertheless allege that petitioners "had no valid security reason to request or order the eviction of [respondents] from the north and south sidewalks of California Street between Third and Fourth Streets," *id.* at 186a, and that petitioners were instead motivated by a desire to discriminate against respondents on account of their expressive activity, *id.* at 185a. The only allegations in support of those conclusory statements about petitioners' alleged motive consist in two strands of the Second Amended Complaint. Neither of those strands, however, creates a plausible inference that petitioners acted with a discriminatory purpose.

First, respondents allege that, if security concerns had been "the true reason" for moving the anti-Bush demonstrators from their initial location, petitioners would likewise have removed "all persons dining, staying at, or visiting the Inn who had not been screened," and would have required that the pro-Bush group be moved away from the President's post-dinner motorcade route. App., *infra*, 178a. Both of those other groups, however, were readily distinguishable from the group of 200 to 300 persons who were located between Third and Fourth Streets. Any crowd in that location, whether pro- or anti-Bush, could have provided cover for someone who planned to do the President harm, and the crowd's presence would have made it more difficult for law-enforcement officers to look out for someone with weapons or explosives.

The security concerns arising from the presence of a large group of people near the outdoor patio where the President was dining were plainly different from those

associated with permitting a group (like the pro-Bush demonstrators) to remain along Third Street while the President's *motorcade* travelled by. Similarly, the other diners and guests to whom respondents refer were at the Inn before it was known that the President would dine there. Those individuals therefore were differently situated from (as well as much fewer in number than) the crowd outside, which had gathered in specific anticipation of seeing the President.[7] Petitioners' failure to move additional groups who were differently situated from the group including respondents does not indicate that the security-based rationale was pretextual or inconsistently applied.

Second, respondents invoke excerpts from a "Presidential Advance Manual" and published reports of other occasions on which the Secret Service supposedly acted to keep protestors (but not others) away from the President. App., *infra*, 189a-194a, 213a-217a. Those allegations shed no meaningful light on petitioners' own actions at issue in this case. None of the other incidents is alleged to have involved petitioners, and most of respondents' capsule descriptions of them apparently refer to pre-arranged protest zones associated with events where the President was expected to speak, or to protestors who might have disrupted such events—not to spur-of-the-moment decisions precipitated by unscheduled stops and multiple groups of differently situated people. See *id.* at 190a-194a. As the dissenters below noted, such events did not involve "the same agents or the same circumstances" and "do not show a

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[7] Because of serious law-of-the-case concerns arising from its previous decision in *Moss I*, the court of appeals expressly refrained from relying on respondents' references to the diners and guests at the Inn. App., *infra*, 43a n.5.

pattern pervasive enough to establish an unspoken policy of discrimination, especially in light of the explicit Secret Service policy prohibiting such conduct." *Id.* at 13a-14a.

Similarly, the "Presidential Advance Manual" on which respondents rely was, as the court of appeals acknowledged, "designed to guide the President's political advance team, not the Secret Service." App., *infra*, 42a. As the dissent below noted, the manual "clearly refers to ticketed presidential events, from which demonstrators can be excluded without violating the First Amendment." *Id.* at 14a. Indeed, the manual specifically distinguishes between the Secret Service's responsibility for demonstrators who "appear to be a security threat" and the advance team's responsibility for handling demonstrators who "appear likely to cause only a political disruption." *Id.* at 220a. There are accordingly no nonconclusory factual allegations that plausibly support respondents' naked assertions of discriminatory motive.

2. In cases like this one, where the legality of the defendants' conduct depends in part on their subjective reasons for acting as they did, a mere conclusory allegation of retaliatory (or otherwise improper) intent does not satisfy applicable pleading requirements. See *Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Respondents therefore could not have defeated a motion to dismiss in this case simply by alleging, in purely conclusory terms, that petitioners sought to retaliate against them for expressing anti-Bush views. The rule that such conclusory allegations are insufficient, however, would be of little value in protecting defendants against unsupported claims if a

plaintiff could carry its burden by pleading specific facts that, while "consistent with" an inference of unlawful conduct, are "more likely explained by[] lawful * * * behavior." *Id.* at 680.

Rather, to create an inference of unlawful motivation sufficient to defeat a motion to dismiss, the plaintiff must plead specific facts that, taken as true, refute any "obvious alternative explanation" for the defendant's conduct. *Iqbal*, 556 U.S. at 682 (citation omitted). In *Iqbal*, the obvious alternative explanation for Iqbal's detention was that "the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 683. There, Iqbal failed to make a plausible case that discrimination, rather than this alternative explanation, was the reason for his treatment. *Id.* at 682 ("To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as 'of high interest' because of their race, religion, or national origin."). And in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), the obvious alternative explanation to anti-competitive conspiracy was that the defendant companies were simply former government-sanctioned monopolists engaging in parallel but independent conduct, "sitting tight, expecting their neighbors to do the same thing." *Id.* at 568. The Court concluded that "[w]ithout more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id.* at 556-557.

Here, in contrast, the court of appeals gave no meaningful weight to the common-sense inference that peti-

tioners, two Secret Service agents charged by statute with protecting the President (see 18 U.S.C. 3056(a)(1)), actually considered it important to move everyone between Third and Fourth Streets away from the restaurant patio (out of handgun or explosive range) in order to protect the President. Rather, the court stated that, "[a]s this case arises on a motion to dismiss, any explanation for the agents' differential treatment of the pro- and anti-Bush demonstrators would have to be *so obviously applicable* as to render the assertion of unconstitutional viewpoint discrimination implausible." App., *infra*, 47a (emphasis added). The practical effect of the court's approach is to preclude dismissal of a *Bivens* complaint whenever an innocent explanation for the defendant's conduct is not obviously the correct one—*i.e.*, whenever an inference of unlawful motivation is "consistent with" the facts alleged in the complaint. But see *Iqbal*, 556 U.S. at 680-682.

In both *Iqbal* and *Twombly*, this Court recognized that a good deal more than that is needed to bring the plaintiff's factual allegations "across the line from conceivable to plausible." *Iqbal*, 556 U.S. at 680 (quoting *Twombly*, 550 U.S. at 570). In particular, when a plaintiff's factual allegations are susceptible to "more likely [innocent] explanations," those allegations "do not plausibly establish [an invidious] purpose." *Id.* at 681. By requiring the defendant to negate any realistic possibility that he acted with an unconstitutional motive, the court of appeals' test all but precludes dismissal of a complaint in a case in which the plaintiff alleges an improper motive. That is particularly so because the record on a motion to dismiss typically consists of the complaint alone.

3. In *Crawford-El* v. *Britton*, 523 U.S. 574 (1998), this Court suggested that trial courts could weed out insubstantial motive-based cases by "insist[ing] that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 598. That suggestion anticipated, and is fully consistent with, the requirements subsequently announced in *Twombly* and *Iqbal*. The court of appeals in this case, however, allowed the complaint to survive a motion to dismiss without "specific, nonconclusory factual allegations" giving rise to a sound inference of unlawful motive.

The court of appeals suggested that petitioners could yet prevail by refuting respondents' allegations of unlawful motive "[a]fter discovery or trial." App., *infra*, 46a. This Court has repeatedly explained, however, that "the basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Iqbal*, 556 U.S. at 685 (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)). "Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." *Ibid.* Here, in a case that has made two trips to the court of appeals, the Secret Service and two of its agents have already borne the burdens of litigation for more than seven years since respondents filed their initial complaint. See 1:06-cv-03045 Docket entry No. 1 (D. Or. July 6, 2006).

By making it much more difficult to get cases dismissed at the pleadings-stage, the court of appeals'

decision diminishes government employees' ability to use qualified immunity as "an immunity from suit rather than a mere defense to liability." *Pearson*, 555 U.S. at 231 (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985)). That fundamental disruption in the doctrine warrants this Court's review.

C. The Decision Below Is Sufficiently Important To Warrant This Court's Review, Particularly In Light Of The Threats That It Poses To The Work Of The Secret Service

1. This Court and its members have repeatedly recognized the importance and sensitivity of the Secret Service's work in protecting the President and other high-level officials. In *Hunter*, the Court summarily reversed the Ninth Circuit's denial of qualified immunity to Secret Service agents who had been investigating threats to the President. 502 U.S. at 224-229. The Court explained that a core justification for qualified immunity—*i.e.*, that "'officials should not err always on the side of caution' because they fear being sued"—"is nowhere more important than when the specter of Presidential assassination is raised." *Id.* at 229 (quoting *Davis* v. *Scherer*, 468 U.S. 183, 196 (1984)). Justice Scalia, concurring in the judgment, concluded that the court of appeals' error involved the misapplication of the governing legal standard to the facts before the court, but found it "worthwhile to establish that this Court will not let such a mistake stand with respect to those who guard the life of the President." *Ibid.*; see *Reichle*, 132 S. Ct. at 2097 (Ginsburg, J., concurring in the judgment) (concluding that "ordinary law enforcement officers" would not be protected from the retaliatory-arrest claim at issue in that case, but that a different standard should apply to Secret Service agents evaluating a potential

"threat to the Vice President's physical security"); *Rubin* v. *United States*, 525 U.S. 990, 990-991 (1998) (Breyer, J., dissenting from denial of certiorari) ("The physical security of the President of the United States has a special legal role to play in our constitutional system.").

2. Although the decision below is not limited to the Secret Service context, its unduly permissive standard for allowing *Bivens* suits alleging viewpoint discrimination poses particularly great risks to the Secret Service's work. In protecting the physical safety of high-ranking public officials, Secret Service agents must often make spur-of-the-moment judgments in circumstances where the cost of a mistake may be very high. In determining whether particular individuals pose a threat to public officials, moreover, Secret Service agents "rightly take into account words spoken to, or in the proximity of, the person whose safety is their charge." *Reichle*, 132 S. Ct. at 2097 (Ginsburg, J., concurring in the judgment); cf. *Hunter*, 502 U.S. at 229-230 (Stevens, J., dissenting) ("Those 'who guard the life of the President' properly rely on the slightest bits of evidence—nothing more than hunches or suspicion—in taking precautions to avoid the ever-present danger of assassination."). As a result, distinguishing between permissible and impermissible content-based distinctions is a particularly delicate task. And even when the actions of Secret Service agents are subjectively motivated not by the content of anyone's speech, but merely by a large group's proximity to the President, agents' crowd-control measures may often have disparate impacts on the location of different individuals who are expressing different viewpoints.

During a typical year, the President alone makes hundreds of stops or appearances in public areas around the country. Impromptu or unscheduled visits, like the 2004 visit to the restaurant patio in Jacksonville, are not uncommon. Such stops often require agents to make quick, on-the-spot decisions to safeguard the President in the presence of large groups of people. Cf. *Scheuer* v. *Rhodes*, 416 U.S. 232, 246-247 (1974) (qualified immunity protects officials who need to "act swiftly and firmly" when faced with "an atmosphere of confusion, ambiguity, and swiftly moving events").

Agents should not be forced—as respondents suggested in the court of appeals—to keep the President away from a destination simply because a group of protesters may need to be moved to ensure the President's safety.[8] Nor should Secret Service agents be compelled to inquire into the political views of various groups and take additional steps to interfere with even more speech than security concerns would require in an attempt to keep opposing groups at roughly equal distances from the President, even as his own location changes. Cf. App., *infra*, 37a, 44a, 47a (deeming it "critical[]" that the dinner-time relocation of the anti-Bush group meant

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[8] At oral argument in the court of appeals, when asked what petitioners should have done when they arrived at the patio restaurant and discovered 200 to 300 people crowding the block immediately adjacent to the Inn, respondents' counsel stated that the agents should have "prevailed upon the President not to dine at the Inn" at all, or, in order to have "a basis to move the anti-Bush protestors a block east," "they should have moved the pro-Bush demonstrators a block west." Recording of Oral Argument at 42:22 to 43:36, http://www.ca9.uscourts.gov/media/view.php?pk_id=0000008129. But see, *e.g.*, *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988) (noting that a time, place, or manner regulation of speech should "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy").

that it was farther than the pro-Bush group from the President's post-dinner motorcade route).

As the dissenting judges below explained, the court of appeals' decision effectively requires Secret Service agents "to act like concert ushers—ensuring with tape-measure accuracy that everyone who wants to demonstrate near the President has an equally good view of the show." App., *infra*, 8a. In protecting officials throughout the Nation, Secret Service agents are already required to make speedy decisions regarding the potential security implications of multifarious and rapidly evolving factual circumstances. They should not, while working in the Ninth Circuit, be distracted from those security-related assessments by the threat of personal liability if they fail to ensure comparable proximity to the President or other high-level officials of diverse groups who seek to express competing views.

3. Although the court of appeals' errors are sufficiently important to warrant plenary review, this Court may also wish to consider the possibility of summary reversal. In *Hunter*, this Court summarily reversed a Ninth Circuit decision that had erroneously denied qualified immunity to the defendant Secret Service officers. See 502 U.S. at 227-229. In *Brosseau*, the Court summarily reversed a Ninth Circuit decision that had denied qualified immunity based on rules of constitutional law "cast at a high level of generality." 543 U.S. at 199; see *id.* at 198-201. Since then, the Court has recently and repeatedly reiterated the need to consider the alleged unlawfulness of the defendants' conduct at an appropriate level of specificity when evaluating qualified immunity. See *Reichle*, 132 S. Ct. at 2094; *al-Kidd*, 131 S. Ct. at 2084. Summary reversal would likewise be amply justified here, since the decision below implicates *both* the

Secret Service's ability to protect the President *and* the Ninth Circuit's repeated failure, in conducting qualified-immunity analysis, to define the right in question at an appropriate level of specificity.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may also wish to consider summary reversal of the court of appeals' judgment.

Respectfully submitted.

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JULY 2013

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 10-36152, 10-36172

MICHAEL MOSS; LESLEY ADAMS; BETH WILCOX; RICHARD ROYER; LEE FRANCES TORELLE; MISCHELLE ELKOVICH; ANNA VINE, FKA ANNA BOYD, INDIVIDUALLY AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED; JACKSON COUNTY PACIFIC GREEN PARTY, PLAINTIFFS-APPELLEES

v.

UNITED STATES SECRET SERVICE, OF THE DEPARTMENT OF HOMELAND SECURITY; RALPH BASHAM, FORMER DIRECTOR OF THE UNITED STATES SECRET SERVICE, IN HIS INDIVIDUAL CAPACITY; TIM WOOD, UNITED STATES SECRET SERVICE AGENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; ROB SAVAGE, UNITED STATES SECRET SERVICE AGENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; JOHN DOE, 1, UNITED STATES SECRET SERVICE AGENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, PARTICIPATING IN THESE ACTIONS AND KNOWN TO THE DEFENDANT SECRET SERVICE, BUT UNKNOWN AT THIS TIME TO PLAINTIFFS; DAVID TOWE, CHIEF OF POLICE OF JACKSONVILLE, OREGON, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION OF THE STATE OF OREGON; MIKE WINTERS, SHERIFF OF JACKSON COUNTY, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; JACKSON COUNTY, A MUNICIPAL CORPORATION OF THE STATE OF OREGON; JOHN DOES, 2-20 THAT IS, THE COMMANDING OFFICERS IF OTHER LAW ENFORCEMENT AGENCIES OF PUBLIC BODIES PARTICIPATING IN THESE ACTIONS, IN THEIR OFFICIAL

AND INDIVIDUAL CAPACITIES, KNOWN TO THE IDENTIFIED DEFENDANTS, BUT UNKNOWN AT THIS TIME TO PLAINTIFFS; MUNICIPAL DOES, THE PUBLIC BODIES EMPLOYING DEFENDANTS JOHN DOES 2-20; MARK SULLIVAN, DIRECTOR OF THE UNITED STATES SECRET SERVICE, IN HIS OFFICIAL CAPACITY, DEFENDANTS

AND

RON RUECKER, SUPERINTENDENT OF THE OREGON STATE POLICE, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; ERIC RODRIQUEZ, FORMER CAPTAIN OF THE SOUTHWEST REGIONAL HEADQUARTERS OF THE OREGON STATE POLICE, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; TIM F. MCCLAIN, SUPERINTENDENT OF THE OREGON STATE POLICE, IN HIS OFFICIAL CAPACITY; RANDIE MARTZ, CAPTAIN OF THE SOUTHWEST REGIONAL HEADQUARTERS OF THE OREGON STATE POLICE, IN HIS OFFICIAL CAPACITY, DEFENDANTS-APPELLANTS

MICHAEL MOSS; LESLEY ADAMS; BETH WILCOX; RICHARD ROYER; LEE FRANCES TORELLE; MISCHELLE ELKOVICH; ANNA VINE, FKA ANNA BOYD, INDIVIDUALLY AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED; JACKSON COUNTY PACIFIC GREEN PARTY, PLAINTIFFS-APPELLEES

v.

UNITED STATES SECRET SERVICE, OF THE DEPARTMENT OF HOMELAND SECURITY; RALPH BASHAM, FORMER DIRECTOR OF THE UNITED STATES SECRET SERVICE, IN HIS INDIVIDUAL CAPACITY; JOHN DOE, 1, UNITED STATES SECRET SERVICE AGENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, PARTICIPATING IN THESE ACTIONS AND KNOWN TO THE DEFENDANT SECRET SERVICE, BUT UNKNOWN AT THIS TIME TO PLAINTIFFS; DAVID TOWE, CHIEF OF POLICE OF JACKSONVILLE, OREGON, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES;

CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION OF THE STATE OF OREGON; MIKE WINTERS, SHERIFF OF JACKSON COUNTY, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; JACKSON COUNTY, A MUNICIPAL CORPORATION OF THE STATE OF OREGON; JOHN DOES, 2-20 THAT IS, THE COMMANDING OFFICERS IF OTHER LAW ENFORCEMENT AGENCIES OF PUBLIC BODIES PARTICIPATING IN THESE ACTIONS, IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES, KNOWN TO THE IDENTIFIED DEFENDANTS, BUT UNKNOWN AT THIS TIME TO PLAINTIFFS; MUNICIPAL DOES, THE PUBLIC BODIES EMPLOYING DEFENDANTS JOHN DOES 2-20; MARK SULLIVAN, DIRECTOR OF THE UNITED STATES SECRET SERVICE, IN HIS OFFICIAL CAPACITY; RON RUECKER, SUPERINTENDENT OF THE OREGON STATE POLICE, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; ERIC RODRIQUEZ, FORMER CAPTAIN OF THE SOUTHWEST REGIONAL HEADQUARTERS OF THE OREGON STATE POLICE, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; TIM F. MCCLAIN, SUPERINTENDENT OF THE OREGON STATE POLICE, IN HIS OFFICIAL CAPACITY; RANDIE MARTZ, CAPTAIN OF THE SOUTHWEST REGIONAL HEADQUARTERS OF THE OREGON STATE POLICE, IN HIS OFFICIAL CAPACITY, DEFENDANTS

AND

TIM WOOD, UNITED STATES SECRET SERVICE AGENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES; ROB SAVAGE, UNITED STATES SECRET SERVICE AGENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, DEFENDANTS-APPELLANTS

Argued and Submitted: Oct. 11, 2011
Filed: Apr. 9, 2012
Amended: Feb. 26, 2013

ORDER

Before: DAVID M. EBEL*, MARSHA S. BERZON, and N. RANDY SMITH, Circuit Judges.

Dissent to Order by Judge O'SCANNLAIN; Opinion by Judge BERZON.

The opinion filed on April 9, 2012, and appearing at 675 F.3d 1213, is amended as follows:

At slip opinion page 3846, 675 F.3d at 1229, immediately before the heading "C. Fourth Amendment," add the following text:

<* * *

As this case arises on a motion to dismiss, any explanation for the agents' differential treatment of the pro- and anti-Bush demonstrators would have to be so obviously applicable as to render the assertion of unconstitutional viewpoint discrimination implausible. The Dissent from the Denial of Rehearing En Banc ("En Banc Dissent") maintains otherwise, so we briefly respond to its analysis:

Our opinion makes clear that there is simply *no* apparent explanation for why the Secret Service agents permitted only the pro-Bush demonstrators, and not the anti-Bush protestors, to remain along the President's after-dinner motorcade route, *see* Op. at 1225, 1228; the En Banc Dissent suggests

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* The Honorable David M. Ebel, Senior Circuit Judge for the Tenth Circuit, sitting by designation.

none. And the explanation proffered in the En Banc Dissent for the agents' actions in moving the anti-Bush demonstrators in the first place—namely that the pro-Bush demonstrators were not moved because they were ostensibly further than the protestors from the patio where President Bush was dining, *see* En Banc Dissent at 14—is not a basis for granting the agents qualified immunity at the pleadings stage, for several reasons:

First, the En Banc Dissent's speculative explanation is non-responsive to the protestors' viewpoint discrimination claim. The question is not why the agents moved the anti-Bush protestors *somewhere*, but rather why the agents moved the protestors a considerable distance, to a location that, as we have explained, was in "relevant ways . . . not comparable" to the place where the pro-Bush group was allowed to remain. *See* Op. at 1228. No "tape[ ] measure" is required, *see* En Banc Dissent at 12, to appreciate that demonstrators separated by more than a full square block, and two roadways, from the public official to whom and about whom they wish to direct a political message will be comparatively disadvantaged in expressing their views. Nor does one need a noise dosimeter to know that the President will be able to hear the cheers of the group left alongside his travel route but unable to hear the group restricted to an area about two square blocks away.

Perhaps there was a reason for the considerable disparity in the distance each group was allowed to

stand from the Presidential party—for example, traffic, or an obstruction on the square block adjacent to the Inn, requiring that the anti-Bush demonstrators be moved more than a block further away. But, as matters now stand, nothing in the En Banc Dissent's entirely hypothetical "explanation is so convincing" as to render "*im*plausible" the plaintiffs' claim of viewpoint discrimination. *See Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011), *cert. denied*, — U.S. —, 132 S. Ct. 2101, 182 L. Ed. 2d 882 (2012). It is therefore premature at this stage to credit the En Banc Dissent's theory instead of the protestors'. *See id.* For the same reason, the En Banc Dissent's assertion, *see* En Banc Dissent at 12, that the panel has "second[ ] guess[ed]" the Secret Service agents' judgment about how best to protect the President fails to account for the fact that at this stage of the case, the record is devoid of *any* explanation for the substantial difference in where the two groups of demonstrators were allowed to stand relative to the President's locations.

Finally, the En Banc Dissent's invocation of the case law upholding certain buffer zones, *see id.* at 22, actually illustrates well why the complaint *does* establish a plausible claim of a violation of clearly established law regarding impermissible viewpoint discrimination in a public forum. Such buffers have been upheld *only*, and expressly, on the understanding that the restrictions are content and viewpoint neutral. For example, in *Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d

597 (2000), the Supreme Court upheld the buffer zone ordinance there at issue only after emphasizing that it applied "to all 'protest,' to all 'counseling,' and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision. That is the level of neutrality that the Constitution demands." *Id.* at 725, 120 S. Ct. 2480. Had the ordinance in *Hill* established a one-hundred foot buffer zone for pro-abortion demonstrators and a three-hundred foot buffer zone for anti-abortion protestors, there is no doubt such a viewpoint discriminatory ordinance would have been summarily invalidated.

The protestors here plausibly allege just such a significant *difference* in the buffer zone in a public forum. And *Hill* was, of course, decided before the events in this case. The protestors therefore allege a plausible case of impermissible viewpoint discrimination as of the time this case arose.>

An amended opinion is filed concurrently with this order.

With this amendment, the panel has unanimously voted to deny appellants' petition for rehearing. Judge Berzon and Judge N.R. Smith have voted to deny the petition for rehearing en banc, and Judge Ebel so recommended.

The full court has been advised of the petition for rehearing en banc. A judge of the court requested a vote on en banc rehearing. The majority of the active

judges have voted to deny rehearing the matter en banc. Fed. R. App. P. 35(f).

The petition for rehearing and the petition for rehearing en banc are **DENIED**. Judge O'Scannlain's dissent from the denial of en banc rehearing is filed concurrently herewith.

No further petitions shall be entertained.

O' SCANNLAIN, Circuit Judge, joined by KOZINSKI, Chief Judge, and GOULD, TALLMAN, BYBEE, CALLAHAN, BEA, and IKUTA, Circuit Judges, dissenting from the denial of rehearing en banc:

To quote from the Government's brief, "[t]he panel's decision in this case is a textbook case-study of judicial second-guessing of the on-the-spot judgment that Secret Service agents assigned to protect the President have made about security needs." In effect, the panel holds today that the Constitution requires Secret Service agents to subsume their duty to protect the President to their newly created duty to act like concert ushers—ensuring with tape-measure accuracy that everyone who wants to demonstrate near the President has an equally good view of the show. This cannot be the law. With respect, I must therefore dissent from our unfortunate failure to rehear this case en banc.

I

This is a *Bivens* action brought by Michael Moss and numerous others (the "protesters" or "anti-Bush demonstrators") against United States Secret Service agents Tim Wood and Rob Savage, who were assigned

to protect President George W. Bush during a 2004 campaign appearance in Oregon.[1] The protestors' second amended complaint alleges that the agents engaged in viewpoint discrimination in violation of their First Amendment rights when the agents moved them to create a security perimeter around the President. To clarify the allegations pertinent to this claim, one must focus on the relevant facts as set forth in the protesters' operative complaint.

Anticipating the President's appearance at an event in Jacksonville, Oregon, both pro-Bush and anti-Bush demonstrators gathered approximately two blocks from the President's hotel there and conducted demonstrations with chants, slogans, and signs. Spread out along California Street, the pro-Bush demonstrators were located just west of Third Street, and the anti-Bush demonstrators were located between Third and Fourth Streets.

While en route to the event, the President decided to eat dinner at the Jacksonville Inn, a restaurant on California Street between Third and Fourth Streets. He arrived in his motorcade via Third Street, and both the pro-Bush and anti-Bush demonstrators "had equal access" to him; the anti-Bush demonstrators were not moved from the President's motorcade route prior to his arrival at the Inn even though a Secret Service agent was already on site and could have ordered the police to do so.

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[1] The panel opinion resolves claims against other officers under 42 U.S.C. § 1983 which are not at issue here.

Upon his arrival, the President entered the back patio of the Inn and was seated in the outdoor patio dining area. Shortly thereafter, the Secret Service directed local police to move "all persons between Third and Fourth streets"—immediately in front of the Inn—two blocks east to the east side of Fifth Street because "they did not want anyone within handgun or explosive range of the President." As it happened, these "persons" were the anti-Bush demonstrators. The pro-Bush demonstrators were not moved because they were already located one block west of the outdoor patio where the President was dining.

Alleging that the Secret Service agents' security rationale for moving them was "false" and that the agents were, in actuality, "tak[ing] action to stifle and suppress" their protest, the anti-Bush demonstrators brought this action, claiming that the Secret Service agents violated their First Amendment rights and seeking damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Their claim boils down to two grievances. First, after the security perimeter around the President was established, they were forced to demonstrate from an area approximately one block farther from the President than the pro-Bush demonstrators. And second, they were farther from the President's motorcade route than the pro-Bush demonstrators when he left the Inn because they were not returned to their original location before the President left.

The protestors' first amended complaint, alleging substantially similar facts, was dismissed for failure to plead a plausible claim. *See Moss v. U.S. Secret Serv. (Moss I)*, 572 F.3d 962 (9th Cir. 2009). After the anti-Bush demonstrators filed their (now operative) second amended complaint, the Secret Service agents again moved to dismiss, arguing that the demonstrators still failed to plead a plausible claim or, alternatively, that they were entitled to qualified immunity. *Moss v. U.S. Secret Serv. (Moss II)*, 675 F.3d 1213, 1221-22 (9th Cir. 2012). The district court denied their motion. *Id.* at 1219, 1222. The panel now affirms that denial, problematically holding that it is "clearly established" in a broad sense that "government officials may not disadvantage speakers based on their viewpoint" and denying the agents qualified immunity. *Id.* at 1228. It is in reaching this conclusion that the panel regrettably errs.

II

The panel's qualified immunity analysis in this case is wrong—doubly wrong. First, the panel fails to separate the factual allegations that it must credit from the legal conclusions that it may not. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). Second, the panel defines the right at issue at an impermissibly high level of generality, asking whether it is "clearly established" in a broad sense that "the government" may not engage in "viewpoint discrimination" and concluding that it is. *See Moss II*, 675 F.3d at 1228. Having started with the wrong assumptions and asked the wrong question,

it is no surprise that the panel arrives at the wrong answer.

A

Beginning with the assumption that it must "tak[e] the protestors' allegation of discriminatory motive [on the part of the Secret Service agents] as true," the panel quickly reaches the conclusion that it is "'beyond debate' that, particularly in a public forum, government officials may not disadvantage speakers based on their viewpoint." *Id.* By using the protestors' allegations about the agents' discriminatory motive as a starting point, however, the panel turns *Iqbal* on its head and places its analysis on shaky ground from the start.

1

As the panel notes, the protestors' complaint did indeed allege that the Secret Service agents engaged in viewpoint discrimination—reciting specifically that "[v]iewpoint discrimination by the Secret Service in connection with President Bush was the official policy of the White House." But, contrary to the panel's view, this allegation, which amounts to a legal conclusion about the agents' viewpoint-discriminatory motives, should not have been afforded a presumption of truth. "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937. Here, the allegation of a discriminatory motive contained in the protestors' complaint is almost identical to the "legal conclusion" to which the Supreme Court refused to afford a presumption of

truthfulness in *Iqbal*. *Id.* at 680-81, 129 S. Ct. 1937 (rejecting the allegation that government officials "knew of, condoned, and wilfully and maliciously agreed to subject [Iqbal] to harsh conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest" as a legal conclusion (internal quotation marks omitted) (second alteration in original)). Like in *Iqbal*, the bare allegation of a discriminatory motive contained in the protestors' complaint is "disentitle[d] to the presumption of truth." *Id.* at 681, 129 S. Ct. 1937; *cf. Estate of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1050 (9th Cir. 2002). The panel should not have accorded it any weight in its qualified immunity analysis.

2

Setting aside such a bald assertion, only two factual allegations remain to support the protesters' claims about the Secret Service agents' discriminatory motives, neither of which is sufficient to establish plausibly that the agents harbored a subjective animus towards their viewpoint. The first—the protestors' description of purportedly similar Secret Service "actions against anti-government expressive activity"—does not tend to make plausible their claim that the named Secret Service agents sued *in this case* acted with the subjective purpose to suppress their message; none involve these same agents or the same circumstances, and the allegations do not show a pattern pervasive enough to establish an unspoken policy of discrimination, especially in light of the explicit Secret

Service policy prohibiting such conduct. *Cf. Iqbal*, 556 U.S. at 682-83, 129 S. Ct. 1937; *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) ("Liability for improper custom may not be predicated on isolated or sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency that the conduct has become a traditional method of carrying out policy.").

The second—an out-of-context statement taken from the Presidential Advance Team Manual—both lacks the nefarious meaning that the anti-Bush demonstrators, and the panel, would ascribe to it, and is irrelevant. For one, when viewed in context, the statement appears in a section of the manual entitled "Crowd Raising and Ticket Distribution" and clearly refers to ticketed presidential events, from which demonstrators can be excluded without violating the First Amendment. *See Weise v. Casper*, 593 F.3d 1163, 1168 (10th Cir. 2010). But more importantly, the protestors never allege that the Secret Service agents were bound to follow this instruction, which is found in the Advance Team Manual—a guide written for the Presidential Advance Team and *not* the Secret Service. Indeed, the demonstrators have admitted that written Secret Service guidelines, which *do* apply to Secret Service agents, expressly "prohibit Secret Service agents from discriminating between anti-government and pro-government demonstrators."[2] The

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[2] An "advance man" is "[o]ne who arranges for publicity, protocol, transportation, speaking schedules, conferences with local government officials, and minute details of a visit, smoothing the way

manual, therefore, not only lacks a nefarious meaning but also fails to have any bearing whatsoever on the motives of the Secret Service agents at issue in this case.

Given the lack of factual allegations to support the anti-Bush demonstrators' claim of subjective viewpoint animus, the panel should not have afforded this animus allegation a presumption of truth. The panel's subsequent failure to define properly the right at issue for purposes of qualified immunity further compounds this misstep.

B

Taking into account the absence of allegations plausibly demonstrating subjective viewpoint animus, the panel's opinion should have proceeded to determine separately whether the facts as pleaded showed (1) a constitutional violation and (2) a violation of clearly established law. *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223, 236, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009);

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for a political figure." William Safire, Safire's Political Dictionary 8 (5th ed. 2008). By contrast, the Secret Service agents work for the Department of Homeland Security under the direction of the Secretary of Homeland Security, and are tasked with protecting the President. *See* 18 U.S.C. § 3056, *amended by* Pub. L. No. 112-257, 126 Stat. 2413 (2013). Given the very different roles of the advance team and the Secret Service—the former to "smooth[ ] the way" for a candidate and the latter to ensure his security—it is no wonder that their manuals contain different guidelines regarding demonstrators.

Estate of Ford, 301 F.3d at 1049 ("*Saucier*'s key point is that the qualified immunity inquiry is separate from the constitutional inquiry."). Instead, the panel erroneously collapses these two inquiries into one. Concluding that the objective factual events alleged in the complaint established a plausible claim of viewpoint discrimination, it eviscerates the clearly established prong—of course, the panel concludes, it is clearly established that officials may not engage in viewpoint discrimination. *See Moss II*, 675 F.3d at 1223-28.

1

Contrast the panel's approach with the leading qualified immunity cases. One easily could say, for example, in a Fourth Amendment case in which the facts alleged showed that officers used excessive force, that the use of excessive force violates clearly established Fourth Amendment principles. Or in an Eighth Amendment case in which the facts alleged showed deliberate indifference, one could say that deliberate indifference violates clearly established Eighth Amendment principles. But both those statements would be fatally insufficient. *See Saucier*, 533 U.S. at 201-03, 121 S. Ct. 2151; *Estate of Ford*, 301 F.3d at 1050-51. It is equally fatal merely to say that if the protestors have alleged sufficient facts to make a plausible claim of viewpoint discrimination, they have also shown a violation of clearly established law, because viewpoint discrimination is clearly prohibited. *See Weise*, 593 F.3d at 1167 (citing *Anderson v. Creighton*, 483 U.S. 635, 639-41, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987)). Put another way, "when it comes

to qualified immunity, merely stating that the government cannot engage in viewpoint discrimination is just about as general as stating that the government cannot engage in unreasonable searches and seizures —an approach that is too general for the qualified immunity analysis where a plaintiff has the burden of demonstrating not only a constitutional violation, but also a violation of clearly established law." *Weise*, 593 F.3d at 1168 n.1 (citing *Anderson*, 483 U.S. at 639-41, 107 S. Ct. 3034).

To avoid this analytical pitfall, the Supreme Court has mandated that, in qualified immunity cases, the contours of the right must be clearly established in "a more particularized, and hence more relevant, sense," meaning that it must be "clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202, 121 S. Ct. 2151. Contrary to this Supreme Court precedent, the panel in this case simply fails to perform that analysis. It fails to consider whether, in a more particularized sense, the alleged conduct of the Secret Service agents violated clearly established law. *See Ashcroft v. al-Kidd*, — U.S. —, 131 S. Ct. 2074, 2084, 179 L. Ed. 2d 1149 (2011). In so doing, it commits an error all too common to this circuit—one we have been specifically warned not to commit again. *See id.; see also Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004) (per curiam); *Saucier*, 533 U.S. at 200, 121 S. Ct. 2151.

It is clear that had the panel properly applied *Iqbal* and *al-Kidd*, it would have upheld qualified immunity.

Absent the assumption that the Secret Service agents were purposefully engaging in viewpoint discrimination—which the panel should not have made in conducting the clearly established inquiry—the agents' actions did not violate "clearly established" law. *See Estate of Ford*, 301 F.3d at 1050 ("We do not assume that [the officers] acted with deliberate indifference, as that would assume the answer.").

2

Once properly framed in light of the factual allegations in the complaint, two questions of clearly established law are raised in this case: First, was it clearly established that moving one group to a location one block farther from the President than another when creating a Presidential security perimeter constituted a violation of that group's First Amendment rights? And second, was it clearly established that Secret Service agents, who moved a group to maintain a consistent security perimeter around the President, had to move the group back to their original location before the President could leave in his motorcade (or at least had to alter the motorcade route so that all involved got an equal chance to see the President)? The answer to these qualified immunity questions—the questions that the panel should have asked—is a clear "no."

a

In response to the first question, it should be noted that before this decision neither our precedent nor Supreme Court case law prevented Secret Service agents from establishing a security perimeter around the President. Indeed, prior Supreme Court prece-

dent had upheld analogous buffer zones to protect vulnerable patients attempting to enter healthcare facilities and to prevent targeted protests of an abortion doctor's home. *See, e.g., Hill v. Colorado*, 530 U.S. 703, 719-30, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000); *Frisby v. Schultz*, 487 U.S. 474, 479-88, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988). Certainly, one would think, securing the safety of the President ranked as an interest at least on par with preventing harassment of patients and doctors. *Cf. Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991) (per curiam) (noting that proper application of the qualified immunity standard is "nowhere more important than when the specter of Presidential assassination is raised"). Yet in denying the Secret Service agents qualified immunity in this case, our court holds today that it *is* not—and, even more egregiously, it was *clearly established* law that it *was* not, at least as early as 2004.

Moreover, before this decision, no law appeared to require Secret Service agents to ensure that groups of differing viewpoints were positioned in locations exactly equidistant from the President at all times. But again, in this case, our court invents such a requirement and determines that it was long since "clearly established" in our First Amendment jurisprudence. As the Government correctly points out, such a rule will be troublesome in application. As of today, shall Secret Service agents carry tape measures when they engage in crowd control to ensure that groups with different viewpoints are at comparable locations at all

times? If they don't, they will now risk being subject to First Amendment lawsuits in nine Western states.

b

Turning to the second question—whether it was clearly established law that Secret Service agents had to return a group of demonstrators to their original location before the President could leave in his motorcade—one is again at a loss to identify any First Amendment principle that clearly demands such an action. *Cf. United States v. Grace*, 461 U.S. 171, 177-78, 103 S. Ct. 1702, 75 L. Ed. 2d 736 (1983) ("We have regularly rejected the assertion that people who wish to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." (internal quotation marks omitted)); *Menotti v. City of Seattle*, 409 F.3d 1113, 1139 n.49 (9th Cir. 2005) ("[W]e hold that there is no constitutional requirement that protestors be allowed to reach their designated audience in the precise manner of their choosing. . . . "). Indeed, the assertion that some First Amendment doctrine would so require seems absurd. But the panel's holding today bizarrely assures us that this, too, is a "clearly established" ground for bringing a suit alleging infringement of one's First Amendment freedoms. It is hard to imagine how, in light of today's decision, Secret Service agents will navigate the treacherous path between the Scylla of our court's holdings in this case and the Charybdis of their duty to protect the President.

C

One final note: The operative complaint's lack of plausible allegations showing that the Secret Service agents in this case explicitly acted with a subjective intent to suppress the protestors' message differentiates this case from the one on which the panel relies in their qualified immunity analysis. *See Mahoney v. Babbitt*, 105 F.3d 1452, 1458-59 (D.C. Cir. 1997) ("The government has conceded that if appellants were carrying no signs or, indeed, if they were carrying signs favorable to the administration whose second Inaugural was being celebrated, their 'physical intrusion' would be welcomed. It is only the 'purpose of injecting [their] own convictions or beliefs' that causes the government to exclude them."). In light of the allegations in *Mahoney*, which expressly showed a subjective discriminatory purpose on the part of the National Park Service in denying a permit to a group of demonstrators, it is no wonder that the courts were able to find qualified immunity inapplicable and to conclude that the officials there violated clearly established law prohibiting viewpoint discrimination. *See id.* But in this case, where the anti-Bush demonstrators admit that the Secret Service agents offered a neutral security rationale for their actions, the panel should have assessed their objective conduct as alleged in the complaint to determine whether it plausibly demonstrated a violation of clearly established law. *See Estate of Ford*, 301 F.3d at 1050. Sadly, it did not do so; instead, it misstates the law and, ultimately, reaches the wrong result.

"[I]n light of the specific context of this case" the Secret Service agents did not violate any "clearly established" law. *See Saucier*, 533 U.S. at 201, 121 S. Ct. 2151. As such, they were entitled to qualified immunity, and the panel erred in denying it to them. *Id.*

III

Our court's track record in deciding qualified immunity cases is far from exemplary, and with this decision, I am concerned that our storied losing streak will continue.[3] Although we may not have been able to rectify our past mistakes by rehearing this case en banc, we certainly *should have* used this opportunity to avoid repeating them. Alas, the panel here once again commits many familiar qualified immunity errors. It affords unwarranted deference to legal conclusions in the protestors' complaint. It collapses the two-pronged qualified immunity inquiry. It defines the right at issue too broadly. And it fails to give sufficient latitude to those charged with protecting the life of the President. This decision renders the protections of qualified immunity toothless. But even more devastating, this decision hamstrings Secret Service agents, who must now choose between ensur-

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[3] *See, e.g., al-Kidd*, 131 S. Ct. at 2084 (reversing the Ninth Circuit) (warning "the Ninth Circuit in particular" to avoid "defin[ing] clearly established law at a high level of generality"); *Brosseau*, 543 U.S. at 199, 125 S. Ct. 596 (same); *Saucier*, 533 U.S. at 200, 121 S. Ct. 2151 (same); *Hunter*, 502 U.S. at 227-29, 112 S. Ct. 534 (same).

ing the safety of the President and subjecting themselves to First Amendment liability.

I respectfully dissent from our failure to rehear this case en banc.

OPINION

BERZON, Circuit Judge:

During the 2004 presidential campaign, Plaintiff-Appellees, Michael Moss and others who opposed President Bush ("protestors" or "anti-Bush protestors"), organized a demonstration at a campaign stop in Jacksonville, Oregon. They contend that Secret Service agents, Defendant-Appellants Tim Wood and Rob Savage ("agents" or "Secret Service agents"), engaged in unconstitutional viewpoint discrimination in violation of the First Amendment, by requiring the protestors to demonstrate at a distance from the President because they were protesting—rather than supporting—his policies. In addition, the protestors maintain that the police officers who carried out the Secret Service agents' directions, supervised by Defendant-Appellants Ron Ruecker, Superintendent of the Oregon State Police, and Eric Rodriguez, Captain of the Southwest Regional Headquarters of the Oregon State Police ("police supervisors"), used excessive force in violation of the Fourth Amendment. They seek to hold Ruecker and Rodriguez liable for the use of this force.

We hold that the protestors have stated a claim against the Secret Service agents for violation of the First Amendment. The protestors have not, however,

pleaded sufficient facts to sustain their Fourth Amendment claim against the police supervisors. We therefore hold that the excessive force claim should be dismissed.

I. Factual and Procedural Background

A. Facts

During the 2004 presidential campaign, President George W. Bush was scheduled to spend the evening of October 14, 2004 in Jacksonville, Oregon at the Jacksonville Inn Honeymoon Cottage.[1] A group of people opposed to President Bush organized a demonstration to protest his policies. They discussed their plans with the Chief of the Jacksonville Police and with the Jackson County Sheriff, informing both law enforcement officials that the planned demonstration was to be multigenerational, peaceful, and law-abiding. The Jackson County Sheriff agreed to the proposed protest route and stated that officers in riot gear would not be deployed unless necessary. The Jacksonville Police Chief similarly stated that he did not plan to use riot-gear-clad police.

At about 5:00 p.m. on October 14, 2004, between two and three hundred anti-Bush protestors gathered in Griffin Park in Jacksonville. An hour later, the protestors, in accordance with the demonstration route they had pre-cleared with local law enforcement, left the park and proceeded to California Street between

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[1] Because this is an appeal from an order denying Defendants' motion to dismiss, the facts described are taken from Plaintiffs' complaint and are assumed to be true.

Third and Fourth Streets. They stood in front of the main building of the Jacksonville Inn, approximately two blocks south of the Inn's Honeymoon Cottage where the President planned to stay.[2] A similarly-sized group of pro-Bush demonstrators gathered across Third Street from the anti-Bush protestors.

After the two groups had gathered, the President decided to stop for dinner at the restaurant at the Jacksonville Inn, located in the main building. Neither group was aware that the President would not proceed directly to the Honeymoon Cottage until approximately 7:00 p.m., an hour after the demonstrations in front of the Inn began. After learning the President would be stopping at the restaurant, both pro- and anti-Bush demonstrators clustered on the side of the street on which the Inn's main building is located. The anti-Bush demonstrators allege that at that point, "[b]oth sets of demonstrators had equal access to the President during his arrival at the Jacksonville Inn."

Shortly before the President was to arrive at the restaurant, the Secret Service agents on the scene requested that state and local police officers clear the alley from Third Street to the patio dining area behind the Inn, as well as the California Street alley running alongside the Inn. Police officers, dressed in riot gear, cleared these alleys. They also blocked Third Street, north of California Street, and began prevent-

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[2] A map of the area of Jacksonville in which the relevant events occurred is attached as an appendix to this opinion.

ing demonstrators (both pro- and anti-Bush) from crossing the street at the intersection of Third and California Streets.

President Bush arrived at the Jacksonville Inn at approximately 7:15 p.m. and ate dinner on the Inn's outdoor patio, which was enclosed by a 6-foot-high wooden fence. This fence, along with the buildings along California Street, made it impossible for the anti-Bush protestors to see the President. In addition, these obstacles, as well as police officers stationed around the perimeter of the Inn, prevented anyone from walking from the demonstration site to the President's location on the patio.

There were several other diners on the patio in addition to the President's party. In addition, upstairs from the restaurant was a group of approximately thirty people at a medical conference, some of whom ventured downstairs and, finding an unguarded door to the patio, were able to observe the President from a distance of approximately fifteen feet.

At about 7:30 p.m., the Secret Service agents directed state and local police to clear California Street between Third and Fourth Streets, where the anti-Bush protestors had been standing. They first directed the police to move the protestors to the east side of Fourth Street. Subsequently, the agents asked that the protestors be moved to the east side of Fifth Street. The agents assert that they told the police that the reason for these requests was to prevent anyone from being within handgun or explosive range of the President. The protestors allege that

any security rationale provided by the agents to the police was false. Neither the pro-Bush demonstrators nor anyone staying at or visiting the Inn was required to move or to undergo security screening. The protestors maintain that, in fact, the real motive for the agents' action was the suppression of the protestors' anti-Bush viewpoint—that is, that the agents sought to prevent the President or the media from seeing or hearing the protestors' message.

In accordance with the Secret Service directive, police officers in riot gear formed a line across California Street, facing the anti-Bush demonstrators and with their backs to the pro-Bush demonstrators. The officers made amplified announcements, unintelligible to many of the protestors, stating that the protestors' assembly was now unlawful, and ordering them to move. The protestors allege that the police failed to ascertain whether the protestors had heard and understood the direction to move, let alone give them time to move of their own accord. Instead, officers forcibly moved the protestors, in some cases violently shoving them, striking them with clubs, and firing pepper spray bullets.

Once the anti-Bush protestors had been moved to the east side of Fifth Street, the police officers divided them into two groups and encircled the groups, preventing some protestors from leaving the area and separating some families. The defendant police supervisors Ruecker and Rodriguez were not present at the protest, but the protestors allege that the two supervisors nevertheless supervised and directed the

police action and that they were responsible for the training, or lack thereof, that led to the force used against the protestors.

B. Procedural History

At issue in this appeal is the protestors' second amended complaint ("SAC"). Their first amended complaint ("FAC") contained several claims for relief arising out of the facts detailed above. Only two of these claims remain at issue here: (1) a claim for damages under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), against Secret Service Agents Wood and Savage in their individual capacities for viewpoint discrimination in violation of the First Amendment; and (2) a claim for damages under 42 U.S.C. § 1983 against police supervisors Ruecker and Rodriguez in their personal capacities for excessive force in violation of the Fourth Amendment.

After the protestors filed the FAC, the Secret Service agents moved to dismiss. The district court denied their motion and also denied them qualified immunity. The agents appealed to this court. *See Moss v. U.S. Secret Service*, 572 F.3d 962 (9th Cir. 2009) ("*Moss I*"). We held that although the facts the protestors pleaded in the FAC did "not rule out the possibility of viewpoint discrimination," they were insufficient to allege such a claim with the degree of precision required by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 173

L. Ed. 2d 868 (2009), both of which had been decided after the protestors filed the FAC. *Id.* at 971-72.

In particular, we held in *Moss I* that the protestors' unsupported allegations of "impermissible motive on the Agents' part," a "*sub rosa* Secret Service policy of suppressing speech critical of the President," and "systematic viewpoint discrimination at the highest levels of the Secret Service" were, under the post-*Iqbal* pleading standards, "conclusory and . . . therefore not entitled to an assumption of truth." *Moss I*, 572 F.3d at 970. We further determined that the protestors' allegation that the agents directed the police to move the protestors to the east side of Fourth Street was insufficient to support a claim of viewpoint discrimination. We explained that the Fourth Street location was "comparable" to the location of the pro-Bush demonstrators in terms of its proximity to the President when he was dining at the Inn's restaurant. *Id.* at 971. Finally, *Moss I* held that the protestors' allegations concerning the guests and diners at the Inn who were within close range of the President but not subject to screening or required to move "offer[ed] little if any support for" the protestors' viewpoint discrimination claim, because these guests and diners were not seeking to communicate their views and therefore were not similarly situated to the protestors. *Id.* For these reasons, we concluded that the protestors had "fail[ed] to plead facts plausibly suggesting a colorable *Bivens* claim against the Agents." *Id.* Recognizing, however, that the FAC had been filed before the Supreme Court decided *Twombly* and *Iqbal*, and that it was possible the complaint could be

amended to meet the standards articulated in those cases, we granted the protestors leave to amend. *Id.* at 972.

Accordingly, the protestors amended their complaint. The SAC, the complaint at issue here, raises the same claims as the FAC but supports these claims with more—and more detailed—factual allegations.

After the protestors filed the SAC, the Secret Service agents again sought to dismiss the First Amendment claim. Reviewing the agents' motion to dismiss, the magistrate judge to whom the case was referred concluded that the allegations in the FAC, held by *Moss I* to be conclusory, were in the SAC "supported by factual allegations and . . . thus entitled to an assumption of truth" and that "[v]iewing all the factual allegations entitled to assumption of truth in the SAC," the protestors had "pled a plausible claim." The state police supervisors also filed a motion to dismiss. The magistrate recommended that this motion also be denied, explaining that under the framework set forth by this court in *al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009), *overruled on other grounds by Ashcroft v. al-Kidd*, — U.S. —, 131 S. Ct. 2074, 179 L. Ed. 2d 1149 (2011), the protestors had pled a plausible § 1983 Fourth Amendment claim against the supervisors. The magistrate determined that neither the Secret Service agents on the First Amendment claim nor the police supervisors on the Fourth Amendment claim are entitled to qualified immunity at this stage.

The district court adopted the magistrate's report and recommendation in full. Before us now are the

Secret Service agents' and police supervisors' appeals of the district court's denial of qualified immunity.

We begin by briefly discussing the framework for evaluating whether qualified immunity is appropriate, as that framework is pertinent to both of the claims at issue. We then address the First Amendment and Fourth Amendment claims in turn.

II. Discussion

A. Qualified Immunity Framework

"[Q]ualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982)). The purpose of such immunity is to ensure that public officials may be held "accountable when they exercise power irresponsibly," while "shield[ing]" them "from harassment, distraction, and liability when they perform their duties reasonably." *Id.*

To determine whether a government official is entitled to qualified immunity, we conduct a two-prong analysis. *See, e.g., Mattos v. Agarano*, 661 F.3d 433, 440 (9th Cir. 2011). Government officials are denied qualified immunity only if (1) "the facts that a plaintiff has alleged . . . make out a violation of a constitutional right"; and (2) "the right at issue was clearly established at the time of [the] defendant's alleged

misconduct." *Pearson*, 555 U.S. at 232, 129 S. Ct. 808 (internal quotation marks omitted); *see Mattos*, 661 F.3d at 440. These prongs need not be addressed in order; rather courts may "exercise their sound discretion in deciding which of the two prongs . . . should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 555 U.S. at 236, 129 S. Ct. 808.

The first prong assesses whether the wrong a plaintiff alleges is, in fact, a constitutional violation. The second prong assesses the objective reasonableness of the official's conduct in light of the decisional law at the time: A right is clearly established for purposes of qualified immunity only where the contours of the right are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Dunn v. Castro*, 621 F.3d 1196, 1200 (9th Cir. 2010) (internal quotation marks omitted). "Because qualified immunity is an immunity from suit rather than a mere defense to liability, courts have also evaluated the sufficiency of the allegations of the defendant's personal involvement in the deprivation of the right at the second stage of the qualified immunity analysis." *Al-Kidd v. Ashcroft*, 580 F.3d at 964 (internal citation, quotation marks, and emphasis omitted); *see Iqbal*, 129 S. Ct. at 1946.

In analyzing the protestors' First Amendment claim against the Secret Service agents, we begin by addressing the first prong of the qualified immunity framework—whether the facts the protestors have alleged make out a constitutional violation—and then

move to the next prong—whether the right the protestors allege was violated was clearly established at the time of the protest. We proceed in this order because, in this instance, one cannot sensibly determine the reasonableness of the agents' actions without carefully identifying the right they are alleged to have violated and the conduct by which they are alleged to have done so.

With respect to the excessive force claim, we ultimately hold that the protestors have alleged insufficient facts to state a claim against the defendant police supervisors in particular. We nevertheless conduct both prongs of the qualified immunity analysis to clarify which parts of the SAC are sufficient and in what respects it must be amended to state a claim.

B. First Amendment

1.

The anti-Bush protestors claim that the Secret Service agents sought to suppress political speech undertaken on a public street based on the viewpoint of that speech. This claim strikes at the core of the First Amendment.

Public streets are "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988), as they have "immemorially been held in trust for the use of the public," *id.* at 481, 108 S. Ct. 2495 (quoting *Hague v. CIO*, 307 U.S. 496, 515, 59 S. Ct. 954, 83 L.Ed. 1423 (1939)). In such "traditional public fora, the government's ability to permissibly restrict expressive con-

duct is very limited. . . . First Amendment protections are strongest, and regulation is most suspect." *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1022 (9th Cir. 2009) (internal quotation marks and citations omitted). Moreover, "[p]olitical speech is core First Amendment speech, critical to the functioning of our democratic system." *Id.* at 1021. "Traditional public fora," such as the public streets upon which the anti-Bush protestors sought to demonstrate "gain even more importance when they are host to core First Amendment speech." *Id.* at 1022.

As the Supreme Court has repeatedly reiterated, government regulation of political speech in a public forum based on its content is presumptively unconstitutional. *See United States v. Playboy Entm't Group*, 529 U.S. 803, 817, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Rosenberger*, 515 U.S. at 829, 115 S. Ct. 2510. "Viewpoint discrimination is thus an egregious form of content discrimination," one from which "[t]he government must abstain." *Id.* The government may not regulate speech based on "the specific motivating ideology or the opinion or perspective of the speaker," *id.*; nor may it "favor some viewpoints or ideas at the expense of others," *Members of City Council v. Taxpayers for*

Vincent, 466 U.S. 789, 804, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984). We recently summarized these long-standing principles as instructing that "government may not favor speakers on one side of a public debate." *Hoye v. City of Oakland*, 653 F.3d 835, 849 (9th Cir. 2011).[3]

A restriction on speech is viewpoint-based if (1) on its face, it distinguishes between types of speech or speakers based on the viewpoint expressed; or (2) though neutral on its face, the regulation is motivated by the desire to suppress a particular viewpoint. *See Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (en banc) (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642-43, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994)); *ACLU v. City of Las Vegas*, 466 F.3d 784, 793 (9th Cir. 2006) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989)). The anti-Bush protestors allege both that the agents' actions were facially viewpoint discriminatory—that is, that the agents explicitly treated pro- and anti-Bush demonstrators differently —and that their actions, even if facially neutral, were motivated by an impermissible purpose to discriminate against the anti-Bush viewpoint the protestors expressed.

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[3] *Hoye* was, of course, decided after the incident giving rise to this case. We cite it only for its succinct précis of many years of precedents on viewpoint discrimination.

a.

In the FAC, the anti-Bush protestors alleged that the Secret Service directed police to move them to the east side of Fourth Street, approximately the same distance from where the President was dining as the pro-Bush demonstrators. *Moss I*, 572 F.3d at 971. *Moss I* held this allegation insufficient to support a plausible claim of viewpoint discrimination, explaining:

> If the Agents' motive in moving Plaintiffs away from the Inn was . . . suppression of Plaintiffs' anti-Bush message, then presumably, they would have ensured that demonstrators were moved to an area where the President could not hear their demonstration, or at least to an area farther from the Inn then [sic] the position that the pro-Bush demonstrators occupied. Instead, according to the complaint, the Agents simply instructed state and local police to move the anti-Bush protestors to a location situated a comparable distance from the Inn as the other demonstrators, thereby establishing a consistent perimeter around the President.

Id.

Now, in the SAC, the protestors allege that the agents did indeed direct that the anti-Bush demonstration be moved farther from the Inn than the pro-Bush demonstration. The SAC avers that the Secret Service agents not only directed the police to move the anti-Bush protestors "to the east side of Fourth Street," but that the agents "subsequently" directed that the protestors be moved "to the east side of Fifth

Street." The pro-Bush demonstrators were left in place on the west side of Third Street. As a result, the anti-Bush protestors were more than a block farther from where the President was dining than the pro-Bush demonstrators, and, one can infer, were therefore less able to communicate effectively with the President, media, or anyone else inside or near the Inn.

The agents object to the protestors' failure to plead specifically that the President could no longer hear their protests once they were moved. While such an allegation would strengthen the protestors' complaint, its absence does not make their claim implausible. Regardless of whether the President and those near him could actually hear the protestors after they had been moved, it is a plausible inference from the facts alleged that the protestors' chants would be less intelligible from two blocks away.

In addition, and critically, if allowed to remain in their initial locations, members of both the pro- and anti-Bush groups would have been standing along the motorcade route by which the President left the restaurant. However, once the Secret Service agents moved them, the anti-Bush protestors were two blocks away from the motorcade route, while the pro-Bush demonstrators remained along it, and, according to the SAC, could "cheer for President Bush as he traveled to the Honeymoon Cottage."

In their brief, the agents insist that the President's motorcade route between the restaurant and the Honeymoon Cottage is "irrelevant," because the "ar-

mored limousine" in which the President was traveling had far greater security than the open-air patio where the President dined. This argument is unavailing for two reasons: First, it rests on facts outside of the complaint and is therefore not properly cognizable at this stage. Second, the assertion of a viewpoint-neutral rationale cannot transform a facially discriminatory policy—allowing one group of demonstrators access to the President while moving protestors with the opposing view further away—into a valid one. *See ACLU*, 466 F.3d at 793.

In sum, the anti-Bush protestors have alleged that, at the direction of the Secret Service agents, they were moved to a location where they had less opportunity than the pro-Bush demonstrators to communicate their message to the President and those around him, both while the President was dining at the Inn and while he was en route to the Honeymoon Cottage. These allegations support a plausible claim of viewpoint discrimination.

b.

In addition to these allegations of facial viewpoint discrimination, the anti-Bush protestors also allege in the SAC that the Secret Service agents acted with an impermissible motive of shielding the President from those expressing disapproval of him or his policies. As the Supreme Court has explained,

> [t]he principal inquiry in determining content [or viewpoint] neutrality . . . is whether the government has adopted a regulation of speech *because of* disagreement with the message it conveys.

> . . . The government's purpose is the controlling consideration.

Ward, 491 U.S. at 791, 109 S. Ct. 2746 (emphasis added) (internal citations omitted). Thus, if true, the motive allegation would be sufficient in and of itself to support a claim of viewpoint discrimination in violation of the First Amendment. That is, it would be adequate to establish a First Amendment violation even if there had been no pro-Bush demonstrators and therefore no differential treatment.

As noted, the Secret Service agents ostensibly told the police on the scene that their reason for moving the anti-Bush protestors was to ensure that nobody was within handgun or explosive range of the President. The protestors allege that even if the agents did give the police such an explanation, it was merely a pretext and that the agents were in actuality motivated by the determination to suppress the protestors' anti-Bush message. "[A] restriction on expressive activity is" only content- or viewpoint-neutral if it is "based on a non-pretextual reason divorced from the content of the message attempted to be conveyed." *United States v. Griefen*, 200 F.3d 1256, 1260 (9th Cir. 2000). At this stage, the protestors need only plead facts that make plausible their claim that they were moved because of their viewpoint—that the security rationale, if indeed offered by the agents at all, was pretextual. The protestors, in the SAC, have met this burden.

First, the SAC states that it would have been impossible from where the protestors were initially located—and certainly from the east side of Fourth

Street, where the Secret Service agents initially directed they be moved—for anyone to reach the President with a handgun or an explosive. The police cleared the alley between where the protestors were demonstrating and the Inn where the President dined, and officers, clad in riot gear, blocked any access to that alley. In addition, there were buildings and a six-foot high fence blocking any contact between the anti-Bush protestors and the President. None of the protestors attempted to surmount these obstacles to get access to the President. The protestors therefore assert they posed no threat to the President, and there was thus no reason for them to be moved from their initial location, and certainly no reason for them to be pushed beyond the east side of Fourth Street to the east side of Fifth Street. Moreover, according to the SAC, the obstacles between the anti-Bush protestors and the President were similar to those faced by the pro-Bush demonstrators. If the location of the anti-Bush protestors had been a significant security risk, they reason, so too would have been that of the pro-Bush demonstrators.

Second, the Secret Service agents allowed the pro-Bush demonstrators to gather along the motorcade route, well within handgun or explosive "range of the President as he traveled from the Inn to the Honeymoon Cottage where he was staying," As noted, the Secret Service agents argue that this distinction does not indicate that their security rationale was pretextual, because the "armored limousine" in which the President traveled "provide[d] a substantially higher degree of protection from potential external threats"

than did the open-air patio where he ate dinner. But one could view this explanation as further evidence of an impermissible motive: Even where there admittedly was no security threat, the anti-Bush demonstrators were forcibly located farther away from the President than the pro-Bush demonstrators, such that the pro-Bush demonstrators were within sight and hearing range of the President while the anti-Bush protestors were two blocks away.

Finally, the SAC elaborates in much more detail a conclusory allegation in the FAC that the Secret Service maintains "an officially authorized pattern and practice" of shielding the President from dissent. *Moss I* held that the pattern and practice allegation in the FAC, "without *any* factual content to bolster it, is just the sort of conclusory allegation that the *Iqbal* Court deemed inadequate." *Moss I*, 572 F.3d at 970. The SAC provides this additional factual content.

The SAC provides twelve detailed allegations, relying on published reports, of similar instances of viewpoint discrimination against protestors expressing negative views of the President. For example, during a speech given by President Bush, those expressing critical views of the President were sequestered approximately "one-third of a mile away from where [he] was speaking," while those supporting the President were permitted "to stand alongside the motorcade route right up to where the President" was located.

In addition, the SAC alleges that a policy and practice of suppressing criticism of the President is set forth in the Presidential Advance Manual, a redacted

copy of which was attached to the complaint. The Advance Manual directs the President's advance team to "work with the Secret Service and have them ask the local police department to designate a protest area where demonstrators can be placed, *preferably not in view of the event site or motorcade route.*"[4] (emphasis added). Removal of protestors opposed to the President, is, of course, precisely what the anti-Bush protestors allege happened to them. While the Advance Manual is designed to guide the President's political advance team, not the Secret Service, it itself suggests that the Secret Service may play a part in ensuring that protestors are contained to an area away from the President. Furthermore, the protestors allege that, in this instance, because of the sudden change in the President's plans, the advance team had insufficient time to "suppress the protest. Instead," they "relied on the Secret Service to do so."

The protestors' allegations that the agents' conduct in this case accords with viewpoint discriminatory practices instituted in other, similar, circumstances and encouraged by the President's Advance Manual support the plausibility of the inference that, in this case, the Secret Service agents directed that the anti-Bush protestors be moved because of their viewpoint.

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[4] It is clear from the context that the manual is referring only to demonstrators opposed to the President. The following paragraph, for example, suggests that while demonstrators ought to be moved to a protest area out of view of the event or motorcade route, "rally squads" of supporters "countering" the protestors' message ought to be strategically placed in view of the media.

In sum, the anti-Bush protestors have pleaded non-conclusory factual allegations that they were treated differently than the pro-Bush demonstrators; that any security-based explanation for this differential treatment offered by the Secret Service agents was pretextual; and that the agents' directives in this case accord with a pattern of Secret Service action suppressing the speech of those opposed to the President.[5] These allegations, taken together, are sufficient to allow the protestors' claim of viewpoint discrimination to proceed.

2.

Even if they acted unconstitutionally, the Secret Service agents are entitled to qualified immunity unless the "contours" of the First Amendment right they violated were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Saucier v. Katz*, 533 U.S. 194, 202, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001) (internal quota-

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[5] The SAC also contains allegations that there were bystanders at the Inn where the President ate who were neither screened for weapons nor required to move farther from the President. The presence of these unscreened bystanders, the protestors argue, is further evidence that the security rationale offered by the Secret Service agents was pretextual. The agents argue that we are foreclosed, on law of the case grounds, by our previous decision in *Moss I* from considering the way in which the agents treated bystanders at the Inn. Whether this is so is a difficult question. Because we hold that the protestors other allegations are sufficient to support a plausible claim of viewpoint discrimination, we do not decide at this juncture whether *Moss I* prevents us from considering the protestors' bystander allegations.

tions and citations omitted). The Secret Service agents contend that even if the protestors have established a plausible claim of viewpoint discrimination, they have failed to demonstrate "that the right they claim was infringed was clearly established in the specific context at issue here." They characterize the qualified immunity question as whether

> every reasonable officer . . . would have understood that moving the [anti-Bush protestors] only a half block farther from the President than his supporters were located constituted viewpoint discrimination in violation of the First Amendment.

This statement inaccurately characterizes both the protestors' allegations and the governing law.

First, as a factual matter, the parties contest the relevant distances. The protestors allege that they were moved over a block farther from the Inn than the pro-Bush demonstrators. Further, although the agents repeatedly characterize the locations of the pro- and anti-Bush protestors as "comparable," we have already noted that based on the facts alleged, there are relevant ways in which the distances were not comparable.

In addition, the Secret Service agents focus solely on the distance between the protestors and the President while he was dining. They do not address the allegation that the pro-Bush demonstrators were permitted to remain along the President's motorcade route, while the anti-Bush protestors were kept away. This additional discrepancy is quite relevant in assessing whether a reasonable agent could have be-

lieved the direction to relocate the anti-Bush protestors was consistent with the First Amendment.

More fundamentally, the protestors' claim is not simply that they were moved, but that they were relocated *because* they criticized the President. The protestors allege that if the agents asserted a security rationale for moving the protestors, that rationale was false. That is, they allege that the agents' action was both facially discriminatory *and* driven by an improper motive. We must "accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). Therefore, taking the protestors' allegation of discriminatory motive as true, it is clear that no reasonable agent would think that it was permissible under the First Amendment to direct the police to move protestors farther from the President because of the critical viewpoint they sought to express.

The agents suggest that because there are no cases with similar fact patterns, a reasonable agent could not have known that their conduct was unconstitutional. But the denial of qualified immunity does "not require a case directly on point." *Ashcroft v. al-Kidd*, — U.S. —, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011). Rather, it requires that "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* It is "beyond debate" that, particularly in a public forum, government officials may not disadvantage speakers based on their viewpoint.

As decades of Supreme Court doctrine make clear, "[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828, 115 S. Ct. 2510; *see, e.g., R.A.V.*, 505 U.S. at 391-92, 112 S. Ct. 2538; *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972); *see also Metro Display Adver. v. City of Victorville*, 143 F.3d 1191, 1195 (9th Cir. 1998). The "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views," for "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley*, 408 U.S. at 95-96, 92 S. Ct. 2286. Indeed, in a case closely on point, the D.C. Circuit held in *Mahoney v. Babbitt* that the government could not grant permits to demonstrate along the Inaugural Parade route to those supportive of the President and refuse permits to those opposed. 105 F.3d 1452, 1459 (D.C. Cir. 1997).

The anti-Bush protestors have plausibly alleged that the Secret Service agents acted *with the sole intent* to discriminate against them because of their viewpoint; this intent can never be objectively reasonable. After discovery or trial, the evidence could demonstrate that the agents did not, in fact, act with viewpoint discriminatory intent or that, notwithstanding some discriminatory motivation, they acted with the primary intent to protect the President and therefore would have taken the same actions absent any

discriminatory motive. In that case, they are, of course, free to renew their qualified immunity motion. *See Behrens v. Pelletier*, 516 U.S. 299, 306, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996); *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). However, the agents are not entitled to qualified immunity at this stage.

* * *

As this case arises on a motion to dismiss, any explanation for the agents' differential treatment of the pro-and anti-Bush demonstrators would have to be so obviously applicable as to render the assertion of unconstitutional viewpoint discrimination implausible. The Dissent from the Denial of Rehearing En Banc ("En Banc Dissent") maintains otherwise, so we briefly respond to its analysis:

Our opinion makes clear that there is simply *no* apparent explanation for why the Secret Service agents permitted only the pro-Bush demonstrators, and not the anti-Bush protestors, to remain along the President's after-dinner motorcade route, *see* Op. at 1225, 1228; the En Banc Dissent suggests none. And the explanation proffered in the En Banc Dissent for the agents' actions in moving the anti-Bush demonstrators in the first place—namely that the pro-Bush demonstrators were not moved because they were ostensibly further than the protestors from the patio where President Bush was dining, *see* En Banc Dissent at 948 is not a basis for granting the agents qualified immunity at the pleadings stage, for several reasons:

First, the En Banc Dissent's speculative explanation is non-responsive to the protestors' viewpoint discrimination claim. The question is not why the agents moved the anti-Bush protestors *somewhere*, but rather why the agents moved the protestors a considerable distance, to a location that, as we have explained, was in "relevant ways . . . not comparable" to the place where the pro-Bush group was allowed to remain. *See* Op. at 1228. No "tape[ ] measure" is required, *see* En Banc Dissent at 947, to appreciate that demonstrators separated by more than a full square block, and two roadways, from the public official to whom and about whom they wish to direct a political message will be comparatively disadvantaged in expressing their views. Nor does one need a noise dosimeter to know that the President will be able to hear the cheers of the group left alongside his travel route but unable to hear the group restricted to an area about two square blocks away.

Perhaps there was a reason for the considerable disparity in the distance each group was allowed to stand from the Presidential party—for example, traffic, or an obstruction on the square block adjacent to the Inn, requiring that the anti-Bush demonstrators be moved more than a block further away. But, as matters now stand, nothing in the En Banc Dissent's entirely hypothetical "explanation is so convincing" as to render "*im*plausible" the plaintiffs' claim of viewpoint discrimination. *See Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011), *cert. denied*, — U.S. —, 132 S. Ct. 2101, 182 L. Ed. 2d 882 (2012). It is therefore premature at this stage to credit the En Banc Dissent's

theory instead of the protestors'. *See id.* For the same reason, the En Banc Dissent's assertion, *see* En Banc Dissent at 947, that the panel has "second[ ] guess[ed]" the Secret Service agents' judgment about how best to protect the President fails to account for the fact that at this stage of the case, the record is devoid of *any* explanation for the substantial difference in where the two groups of demonstrators were allowed to stand relative to the President's locations.

Finally, the En Banc Dissent's invocation of the case law upholding certain buffer zones, *see id.* at 952, actually illustrates well why the complaint *does* establish a plausible claim of a violation of clearly established law regarding impermissible viewpoint discrimination in a public forum. Such buffers have been upheld *only*, and expressly, on the understanding that the restrictions are content and viewpoint neutral. For example, in *Hill v. Colorado*, 530 U.S. 703, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000), the Supreme Court upheld the buffer zone ordinance there at issue only after emphasizing that it applied "to all 'protest,' to all 'counseling,' and to all demonstrators whether or not the demonstration concerns abortion, and whether they oppose or support the woman who has made an abortion decision. That is the level of neutrality that the Constitution demands." *Id.* at 725, 120 S. Ct. 2480. Had the ordinance in *Hill* established a one-hundred foot buffer zone for pro-abortion demonstrators and a three-hundred foot buffer zone for anti-abortion protestors, there is no doubt such a viewpoint discriminatory ordinance would have been summarily invalidated.

The protestors here plausibly allege just such a significant *difference* in the buffer zone in a public forum. And *Hill* was, of course, decided before the events in this case. The protestors therefore allege a plausible case of impermissible viewpoint discrimination as of the time this case arose.

C. Fourth Amendment

To succeed on their Fourth Amendment claim, the protestors must allege facts from which we could plausibly infer: (1) that excessive force was used against them; (2) that the law at the time of the protest clearly established that the force used was unconstitutionally excessive; and (3) that even though they were not present at the demonstration, Superintendent Ruecker and Captain Rodriguez played a sufficient role in the use of excessive force that they may be held liable for it. While the protestors' allegations are sufficient to support a claim of excessive force and to deny qualified immunity to those who might be liable for the use of that force, they have pleaded no facts that would allow us to make a plausible inference that Ruecker and Rodriguez were in any way involved in the use of excessive force such that they may be held liable for it.

1.

Fourth Amendment claims of excessive force are evaluated according to the framework established by *Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). *See Davis v. City of Las Vegas*, 478 F.3d 1048, 1053-54 (9th Cir. 2007). Under *Graham*,

> [d]etermining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake.

Graham, 490 U.S. at 396, 109 S. Ct. 1865 (internal quotation marks and citations omitted). *Graham* cautioned that reasonableness is to be judged not "with the 20/20 vision of hindsight," but "from the perspective of a reasonable officer on the scene." *Id.*

We first "assess the quantum of force used" and then "measure the governmental interests at stake by evaluating a range of factors," including: (1) "the severity of the crime at issue"; (2) the extent to which "the suspect poses an immediate threat to the safety of the officers or others"; (3) and "whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight." *Davis*, 478 F.3d at 1054 (internal quotation marks and citations omitted). In considering whether, from the perspective of an officer on the scene, "the totality of the circumstances justifie[d]" the force used, additional factors may also be relevant. *Forrester v. City of San Diego*, 25 F.3d 804, 806 n.2 (9th Cir. 1994). For example, we may look to the alternatives available to the officer at the time. *See Davis*, 478 F.3d at 1054.

There is little doubt that under this framework, the force alleged here was excessive. The protestors allege that without ensuring that they heard the police warning that instructed them to move, and without

giving them time to move of their own accord, the police, "including officers clad in riot gear, forced the anti-Bush demonstrators to move . . . , in some cases by violently shoving" them, "striking them with clubs and firing pepper spray bullets at them." Once on the east side of Fifth Street, the police "divided the [anti-Bush protestors] into two groups, encircling each group," and "separat[ing]" families, "including children, some of whom were lost, frightened and traumatized." Although some protestors attempted to leave the area, they were prevented from doing so.

To be sure, the government interest at stake—the protection of the President—is of the highest significance. *See, e.g., Hunter v. Bryant*, 502 U.S. 224, 229, 112 S. Ct. 534, 116 L. Ed. 2d 589 (1991). However, an examination of the *Graham* factors indicates that the force used was excessive even to protect this interest.

"[T]he most important single element" of the *Graham* framework is "whether the suspect poses an immediate threat to the safety of the officers or others." *Chew v. Gates*, 27 F.3d 1432, 1441 (9th Cir. 1994). There is no indication that the anti-Bush protestors posed such a threat to the President, the police officers, or anyone else. The SAC alleges that the protestors were not close enough to the President to harm him and that their protest was entirely peaceful.

The other two *Graham* factors also favor the protestors. They were not committing, and had not committed, any crime. Instead, they were engaging in a peaceful demonstration, the location and timing of which had previously been approved by local police.

Nor is there any indication that they were disobeying the commands of the officers or resisting in any way.

Furthermore, it is a plausible inference from the facts alleged that there were less harmful alternatives available that a reasonable officer on the scene should have considered. According to the SAC, the police did not attempt to contact the protest's organizers, whose contact information they had, nor did they give the group sufficient notice or time to move on their own before being forcibly moved.

The protestors allege that the police used violent physical force and pepper spray on a group of obedient, peaceful protestors. As compared to similar cases, the force used was at least as violent, with no greater justification. For example, we held in *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125, 1131 (2002), that the use of pepper spray against peaceful protestors, even when those protestors linked themselves together and refused to release the locks, was unreasonable. In *P.B. v. Koch*, 96 F.3d 1298, 1304 (9th Cir. 1996), we held that "slapping, punching, and choking" students when there was no reason to use force was excessive. Under these precedents, the protestors' allegations indubitably support a plausible claim of excessive force.

As the cases just discussed indicate, the unreasonableness of this use of force was clearly established at the time of the protest. That conclusion is inescapable even if we focus only on one aspect of the force used. The protestors allege that the police officers used pepper spray bullets, even though the demon-

strators were peaceful and cooperative. It was clearly established at the time of the protest that the use of pepper spray on an individual who is already under control constitutes excessive force in violation of the Fourth Amendment. *See Headwaters Forest Def.*, 276 F.3d at 1130; *LaLonde v. County of Riverside*, 204 F.3d 947, 961 (9th Cir. 2000).

2.

The protestors have not, however, provided sufficient allegations to establish a plausible claim against Ruecker and Rodriguez, in particular, for the use of the excessive force. Ruecker and Rodriguez were not on the scene at the time of the demonstration, but they were the supervisors of the officers who were on the scene. Supervisors may not be held liable under § 1983 for the unconstitutional actions of their subordinates based solely on a theory of respondeat superior. *Iqbal*, 129 S. Ct. at 1948.

We recently summarized the circumstances under which supervisors may be held liable under § 1983 as follows:

> (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinates; or (4) for conduct that shows a "reckless or callous indifference to the rights of others."

al-Kidd, 580 F.3d at 965 (quoting *Larez v. City of L.A.*, 946 F.2d 630, 646 (9th Cir. 1991)).[6] The SAC is inadequate to establish that any of these circumstances apply here. The allegations regarding Ruecker and Rodriguez's role in the use of excessive force are conclusory; none is supported by sufficient—or, for that matter, any—factual content that would allow it to meet the pleading standard articulated in *Iqbal*.

First, the protestors allege that Ruecker, as "Superintendent of the Oregon State Police" was "responsible for directing the operations of the Oregon State Police and supervising the law enforcement officers and agents acting under his authority." Similarly, they allege that Rodriguez, as Captain of the Southwest Regional Headquarters of the Oregon State Police, was "responsible for directing the operations of said Headquarters and supervising the law enforcement officers and agents acting under his authority." These allegations are merely recitations of the *organizational* role of these supervisors. The protestors make no allegation that the supervisors took any specific action resulting in the use of excessive force by

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[6] *Al-Kidd* was decided after *Iqbal*. The extent to which its supervisory liability framework is consistent with that decision and remains good law has been debated. *See, e.g., Al-Kidd v. Ashcroft*, 598 F.3d 1129, 1141 (9th Cir. 2010) (O'Scannlain, J., dissenting from denial of rehearing en banc); *see also Bayer v. Monroe Cnty. Children & Youth Servs.*, 577 F.3d 186, 191 n.5 (3d Cir. 2009); *Maldonado v. Fontanes*, 568 F.3d 263, 274 n.7 (1st Cir. 2009). Because the protestors do not allege sufficient facts to meet the standard set forth in *al-Kidd*, we need not consider that debate.

police officers on the scene of the anti-Bush demonstration.

We have "never required a plaintiff to allege that a supervisor was physically present when the injury occurred." *Starr v. Baca*, 652 F.3d 1202, 1205 (9th Cir. 2011). But § 1983 plaintiffs nevertheless must allege *some* "culpable action or inaction" for which a supervisor may be held liable. *Larez*, 946 F.2d at 645. In an effort to meet this requirement, the protestors allege that Rodriguez "and other individual State and Local Police Defendants," including, we assume for present purposes, Ruecker, "personally directed and approved of the actions of the police." But they do not specify which actions Ruecker or Rodriguez directed and approved. In particular, they do not allege that the supervisors directed or approved the tactics—the shoving, use of clubs, and shooting of pepper spray bullets—employed by the officers in moving the protestors.

Finally, the protestors claim that "the use of overwhelming and constitutionally excessive force against them" was "the result of inadequate and improper training, supervision, instruction and discipline . . . under the personal direction . . . of the State and Local Police Defendants." However, this allegation is also conclusory. The protestors allege no facts whatsoever about the officers' training or supervision, nor do they specify in what way any such training was deficient.

The protestors' reliance on *Connick v. Thompson*, — U.S. —, 131 S. Ct. 1350, 179 L. Ed. 2d 417 (2011), is

misplaced. *Connick* reaffirmed the possibility—left open in *Canton v. Harris*, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989)—that there are circumstances in which a need for training is so obvious that a city that fails to provide it may be held to have been deliberately indifferent even without a pattern of constitutional violations by city employees. *Id.* at 1361 (citing *Canton*, 489 U.S. at 390 n.10, 109 S. Ct. 1197). This concept is inapposite here. There is no debate in this case about the need for training police officers on the constitutional use of force. The questions here are whether any such training they received was deficient, and, if so, whether the defendant police supervisors were responsible for that deficiency. The protestors have alleged no facts that would demonstrate either.

We hold that the protestors have not pleaded sufficient allegations to support a claim of excessive force against Ruecker and Rodriguez. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949. It is possible, however, that the complaint could be saved by amendment. Because the district court held that the SAC was sufficient to state a claim against the police supervisors, it did not, of course, consider whether the protestors ought to be given leave to amend to cure any deficiencies. For us to decide that question, ordinarily addressed to the district court's sound discretion, *see, e.g.*, *Mir v. Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980), would be to usurp the district court's authority. *Cf. Iqbal v. Ashcroft*, 574 F.3d 820, 821 (2d Cir. 2009). We therefore

remand to the district court for dismissal of the protestors' excessive force claim and for a determination in the first instance of whether the protestors ought to be given leave to amend their complaint.

III. Conclusion

In sum, we hold that the protestors have alleged a plausible First Amendment claim and that Agents Wood and Savage are not, at this time at least, entitled to qualified immunity. We therefore **AFFIRM** the district court's ruling, denying the Secret Service agents' motion to dismiss that claim. However, we hold that the protestors have not alleged sufficient facts to support a plausible Fourth Amendment claim against police supervisors Ruecker and Rodriguez. Therefore, we **REVERSE** the district court's denial of the supervisors' motion to dismiss and **REMAND** to that court with instructions to dismiss protestors' Fourth Amendment claim and to determine whether the protestors ought to be given leave to amend.

APPENDIX

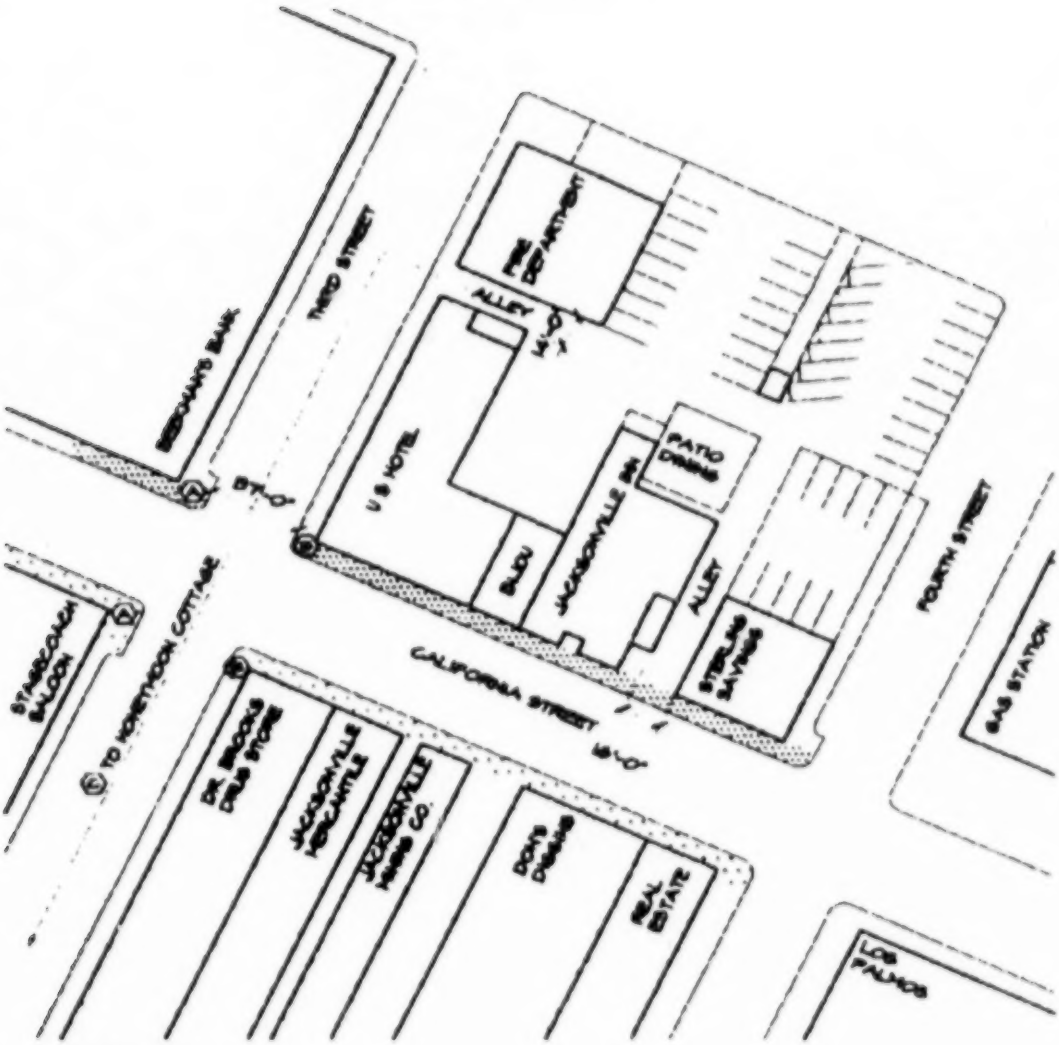

EXHIBIT A TO SECOND AMENDED COMPLAINT
Page 1 of 1

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON,
MEDFORD DIVISION

Case No. CV 06-3045-CL

MICHAEL MOSS, ET AL., PLAINTIFFS

v.

UNITED STATES SECRET SERVICE, DEPARTMENT OF HOMELAND SECURITY, ET AL., DEFENDANTS

Oct. 29, 2010

ORDER

PANNER, District Judge.

Magistrate Judge Mark D. Clarke has filed a Report and Recommendation, and the matter is now before this court. *See* 28 U.S.C. § 636(b)(1)(B), Fed. R. Civ. P. 72(b). When either party objects to any portion of a Magistrate Judge's Findings and Recommendation, the district court reviews that portion of the Magistrate Judge's report *de novo*. 28 U.S.C. § 636(b)(1)(C); *McDonnell Douglas Corp. v. Commodore Bus. Mach., Inc.*, 656 F.2d 1309, 1313 (9th Cir. 1981). Here, defendants have filed timely objections, so I have reviewed the file *de novo*.

DISCUSSION

On interlocutory appeal, the Ninth Circuit reversed and remanded this court's rulings on defendants' motions to dismiss plaintiffs' first amended complaint. *Moss v. U.S. Secret Serv.*, 572 F.3d 962 (9th Cir. 2009). The Ninth Circuit ruled that plaintiffs "should be granted leave to amend their complaint so that they have the opportunity to comply with [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and *Ashcroft v. Iqbal*, — U.S. —, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)]." *Moss*, 572 F.3d at 965.

After remand, plaintiffs have filed a second amended complaint. Defendants move to dismiss based on qualified immunity and failure to state a claim. Judge Clarke's comprehensive Report and Recommendation concludes that defendants' motions should be denied in part.

I agree with Judge Clarke that the second amended complaint meets the stricter pleading standards imposed by *Twombly* and *Iqbal* as to plaintiffs' claims for First Amendment violations against the federal defendants; for First and Fourth Amendment violations and common law claims against the County defendants; for Fourth Amendment violations against the State defendants; and for Fourth Amendment violations and common law claims against the City defendants. R & R at 71.

I also agree with Judge Clarke that defendants have not shown, at least at this stage of the litigation, that they are entitled to qualified immunity. De-

fendants cite *Dunn v. Castro*, 621 F.3d 1196 (9th Cir. 2010), as supplemental authority for their argument that Judge Clarke defined the First Amendment right at issue here too broadly. The *Dunn* opinion, which concerned an incarcerated father's right to receive visits from his children, does not undercut Judge Clarke's analysis of the qualified immunity issue.

Judge Clarke recommends dismissing plaintiffs' remaining claims. For the reasons stated in Judge Clarke's prior Report and Recommendation, I agree that plaintiffs' remaining claims should be dismissed. Accordingly, I ADOPT the current Report and Recommendation in its entirety.

CONCLUSION

Magistrate Judge Clarke's Report and Recommendation (# 178) is adopted. Defendants' motions (# 154, # 156, # 162, and # 164) are granted in part and denied in part as set forth in the Report and Recommendation.

IT IS SO ORDERED.

REPORT & RECOMMENDATION

CLARKE, United States Magistrate Judge:

Plaintiffs bring this action pursuant to 42 U.S.C. § 1983 and *Bivens v. Six Unknown Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) alleging claims for violations of the First, Fourth, Fifth, and Fourteenth Amendments, the Oregon Constitution, and Oregon common law by Defendants. They seek compensatory and punitive damages and injunctive

and declaratory relief from Defendants for alleged unconstitutional, unlawful, and tortious actions against Plaintiffs and Plaintiff Class, arising out of and related to Defendants' disruption of Plaintiffs' lawful assembly and protest demonstration in Jacksonville, Oregon, on October 14, 2004.

Named Plaintiffs[1] include Michael Moss, Lesley Adams, Beth Wilcox, Richard Royer, Lee Frances Torelle, Mischelle Elkovich, Anna Vine, and the Jackson County Pacific Green Party.

Named Defendants include United States Secret Service of the Department of Homeland Security ("Defendant Secret Service"), Mark Sullivan, Tim Wood, Rob Savage, John Doe 1, David Towe, City of Jacksonville, Ron Ruecker, Timothy F. McLain, Ran die Martz, Eric Rodriguez, Mike Winters, Jackson County, and John Does 2-20, Municipal Doe Defendants.

For the purposes of this report and recommendation, the defendants will be referred to by the following:

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[1] Plaintiffs seek class certification (SAC ¶¶ 31-34), but the court declines to address this issue in the present report and recommendation. Federal Rule of Civil Procedure 23(c)(1)(A) explains that the court must determine whether to certify the action as a class action "at an early practicable time" after a suit has been filed. However, "in some cases, it may be appropriate in the interest of judicial economy to resolve a motion for summary judgment or a motion to dismiss prior to a ruling on class certification." *Wright v. Schock*, 742 F.2d 541, 545-46 (9th Cir. 1984).

"Secret Service Defendants" or "Federal Defendants": Defendant Secret Service and individual defendants Sullivan, Basham, Wood, Savage, and John Doe 1.

"State Defendants": Defendants Ruecker, McLain, Martz, and Rodriguez.

"Local Defendants": City of Jacksonville, Jackson County, individual defendants Towe, Winters, John Does 2-20, and Municipal Doe Defendants.

Plaintiffs filed their second amended complaint ("SAC") on October 15, 2009.[2] Before the court are Defendants' motions to dismiss and motion for summary judgment. The motions are granted as to all claims previously dismissed by this court on June 8, 2007[3] to include all injunctive and declaratory relief claims, claims for relief for violations of the Fifth and Fourteenth Amendment, and claims for relief under the Oregon Constitution. (Report & Recommendation, Dkt. No. 107 ("2007 R & R") 35.) As to specific motions before the court:

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[2] Plaintiffs first brought this action in July 2006. Defendants, collectively, filed several motions to dismiss and a motion for summary judgment. The court granted in part and denied in part the motions. Federal Defendants filed an interlocutory appeal with the Ninth Circuit Court of Appeals. The Ninth Circuit reversed the court's decision but granted Plaintiffs leave to amend. Plaintiffs amended their complaint, supplementing facts, re-pleading claims previously dismissed, and pleading new claims.

[3] Court has carefully reviewed its June 2007 decision and sees no reason to disturb those rulings.

Federal Defendants' motion to dismiss (# 164) is denied in part and granted in part. Motion is denied as to Plaintiffs' claims for damages from individual federal defendants for violation of the First Amendment rights. Consistent with the 2007 R & R, motion is granted to dismiss claims against Basham for lack of personal jurisdiction, and the *Bivens* claim against federal defendants for violations of Fourth Amendment rights.

State Defendants' motion to dismiss (# 162) is granted in part and denied in part. Motion is granted to dismiss claims against Ron Ruecker and Eric Rodriguez in their individual capacities for violations of their First Amendment right. Motion is denied as to claims for violations of Fourth Amendment.

Jackson County Defendants' motion to dismiss (# 154) is granted, consistent with the 2007 R & R as to injunctive and declaratory relief and relief under the Oregon Constitution.

City of Jacksonville Defendants' motion to for summary judgment (# 156) is construed as a motion to dismiss as to Plaintiffs' § 1983 claims.[4] The motion is granted as claims for violation of Plaintiffs' First Amendment rights and denied as to claims for violations of Fourth Amendment rights. City Defendants' motion for summary judgment as to claims under

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[4] City Defendants also filed a motion for summary judgment to the FAC. (Dkt. No. 56.) On April 27, 2007, the court held that motion in abeyance pending the close of discovery. (Dkt. No. 103.)

Oregon common law is premature and held in abeyance pending the close of discovery.

I. Procedural History

A. First Amended Complaint

Plaintiffs filed their complaint on July 6, 2006, and filed their first amended complaint ("FAC") on September 26, 2006, alleging claims for violations of the First, Fourth, Fifth, and Fourteen Amendments, as well as state law claims for violations of the Oregon Constitution, and Oregon common law claims of assault and battery, false imprisonment, and negligence. Plaintiffs sought declaratory and injunctive relief, compensatory and punitive damages, interest, attorneys fees, and costs. (Dkt. Nos. 1 and 21.) Defendants collectively filed motions to dismiss and a motion for summary judgment. (Dkt. Nos. 52, 53, 56, 62, 68, and 72.) The court determined that Defendants' summary judgment motions should be held in abeyance pending the close of discovery and considered only the motions to dismiss. (Dkt. No. 103.)

After oral argument, Magistrate Judge Mark Clarke recommended that these motions be granted in part and denied in part.

> Specifically, the court finds that: 1) plaintiffs' allegations fail to establish plaintiffs have standing to seek prospective relief; 2) plaintiffs' substantive due process claims are barred as they are covered by the First and Fourth Amendments; 3) plaintiffs cannot seek damages for violations of the Oregon Constitution; 4) to the extent that plaintiffs are su-

ing state officials in their official capacity for retrospective declaratory relief, plaintiffs' claims are barred by the Eleventh Amendment; 5) plaintiffs have failed to establish personal jurisdiction over defendant Basham; 6) plaintiffs' complaint fails to state a Fourth Amendment claim against defendants Wood and Savage; 7) taking plaintiffs' allegations as true, plaintiffs have pleaded a violation of clearly established First Amendment law by the federal defendants.

(2007 R & R, 2.) District Court Judge Owen Panner adopted the recommendation. (Dkt. No. 130.)

Claims remaining included:[5]

(1) against Federal Defendants: the *Bivens* claim for Federal Defendants' violation of Plaintiffs' First Amendment Rights and for attorneys fees under § 1988.

(2) against State, County and City Defendants: § 1983 claims for violations of their First and Fourth Amendment Rights and § 1988 claim for attorney fees.

(3) against City and County Defendants: § 1983 claims for violations of their First and Fourth Amendment Rights, § 1988 claim for attorneys fees, claims for punitive damages, and claims for com-

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[5] This court respectfully disagrees with the Ninth Circuit's summary of its R & R, which concluded: "The magistrate then issued a final [R & R] recommending dismissal of all of Plaintiffs' claims against the state and local defendants." *Moss v. U.S. Secret Service*, 572 F.3d 962, 967 (9th Cir. 2009).

pensatory damages for violations of Oregon common law for assault and battery, false imprisonment, and negligence.

Federal Defendants filed an interlocutory appeal, appealing the district court's denial of its motion to dismiss claims against them and the denial of their defense of qualified immunity. The Ninth Circuit found for the Federal Defendants: "the factual content contained within the complaint does not allow us to reasonably infer that the [Federal Defendants] ordered the relocation of Plaintiffs' demonstration because of its anti-Bush message." The court concluded that the claim did not satisfy the requirements of *Twombly* and *Iqbal*. *Moss v. U.S. Secret Service*, 572 F.3d 962, 972 (9th Cir. 2009). The Ninth Circuit reversed the district court's decision but granted Plaintiffs leave to amend their complaint, giving them the opportunity to comply with *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) and *Ashcroft v. Iqbal*, —U.S.—, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). *Moss*, 572 F.3d at 964.[6] "They may be able to amend their complaint to include facts that will state a plausible claim, and thus the interests of justice would be served by granting them a chance to do so." *Id.* at 975. The case was

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[6] Federal Defendants also sought an interlocutory appeal on the district court's deferral of their alternative motion for summary judgment. The Ninth Circuit concluded, "The attempt is misguided and, if it were to succeed, would deny Plaintiffs a fair opportunity to litigate the merits of their claim." *Moss*, 572 F.3d at 972.

reversed and remanded on September 8, 2009. (Dkt. No. 147.)

B. Second Amended Complaint

Plaintiffs filed their second amended complaint ("SAC"; Dkt. No. 151) on October 15, 2009 seeking four claims for relief. In filing their SAC, Plaintiffs repled claims the district court previously dismissed but were not appealed, though the Ninth Circuit's permission to replead did not encompass previously dismissed claims. Plaintiffs explained, "Although certain of Plaintiffs' claims were dismissed by the court on the Defendants' motions, those claims are restated here so as to preserve them for appeal." (SAC ¶ 2.) The court is not revisiting its previous decisions on dismissed claims, and the previous ruling remains the same.

Claims in the SAC are summarized as follows:

(1) *First Claim Against Secret Service Defendants:*

Individual Secret Service Defendants, except Defendant Sullivan, are liable in their individual or personal capacities to Plaintiffs for compensatory damages under *Bivens* for violations of First, Fourth, and Fifth Amendment rights. Plaintiffs seek punitive damages and declaratory relief under *Bivens* as well as declaratory and supplemental injunctive relief under 5 U.S.C. § 702 against all Defendants in their official capacities and all person acting in the official capacities as their agents.

(2) *Second Claim Against State, Jackson County and City of Jacksonville Defendants:*

Defendants, except State Defendant McLain and Martz, are liable in their individual and personal capacities for compensatory damages under 42 U.S.C. § 1983 and for attorneys fees under 42 U.S.C. § 1988 for violations of their First, Fourth, Fifth, and Fourteenth Amendment rights. Plaintiffs seek punitive damages and declaratory relief. Plaintiffs assert they are entitled to injunctive relief from all Defendants in their official capacities and all person acting in the official capacities as their agents.

(3) *Third Claim Against Jackson County and City of Jacksonville Defendants*

Plaintiffs seek compensatory damages for violations of their rights under the Oregon Constitution. They also seek declaratory and injunctive relief and attorneys fees pursuant to *Armaria v. Kitzhaber*, 959 O, 2d 49 (Or. 1998). (SAC ¶¶ 112-115.)

(4) *Fourth Claim Against Jackson County and City of Jacksonville Defendants*

Plaintiffs seek compensatory damages under Oregon common law for assault and battery, false imprisonment, and negligence. (SAC ¶¶ 116-118.)

In the SAC, Plaintiffs pled new facts and asserted new claims (1) against Secret Service Defendants, Sullivan, Basham, Wood, and Savange in their individual or personal capacities for declaratory relief under *Bivens* for violations of their Constitutional rights under the First, Fourth, and Fifth Amendment (SAC ¶ 105) and (2) against state and local defendants Towe, Ruecker, Rodriguez, McLain, Martz, and Win-

ters in their individual and personal capacities under 42 U.S.C. § 1983 for violations of their constitutional rights under the First, Fourth, and Fifth Amendments. (SAC ¶ 108.)

Defendants filed several motions to dismiss claims against them under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim. City Defendants filed a motion for summary judgment on all claims against them. Motions include

(1) Federal Defendants Secret Service, Mark Sullivan, Ralph Basham, Tim Wood, and Rob Savage's Motion to Dismiss (# 165)

(2) State Defendants Ron Ruecker, Eric Rodriguez, Tim McLain, and Ran die Martz's Motion to Dismiss (# 162)

(3) Defendants Jackson County and Mike Winters' Motion to Dismiss (# 154),

(4) Defendants City of Jacksonville and David Towe's Motion for Summary Judgment (# 156)

The court heard oral argument on May 12, 2010.

II. Background

On October 14, 2004, former President George W. Bush made a campaign appearance in Central Point, Oregon. The President was scheduled to spend the evening at the Honeymoon Cottage in Jacksonville, Oregon. Plaintiffs, who had learned of the President's plan to visit Jacksonville, organized a demonstration to their express opposition to the President and his policies. Plaintiffs assert they communicated

their plans with Defendant Towe of the City of Jacksonville and Defendant Winters of Jackson County. (SAC ¶¶ 40-41.) Around 6:00 p.m., Plaintiffs, consisting of approximately 200 to 300 anti-Bush demonstrators, assembled on California Street between Third and Fourth Streets, where the Jacksonville Inn (the "Inn") was located. The Honeymoon Cottage was approximately two blocks south of the Inn.

A similarly sized group of pro-Bush demonstrators assembled adjacent to the anti-Bush demonstrators, beginning at the western curb of Third Street and extending west along California Street. They were separated from the anti-Bush demonstrators by the 37-foot width of Third Street. (SAC ¶¶ 45–48.)

En route to Jacksonville, the President decided to dine at the Inn. At approximately 7:00 p.m., both pro-Bush and anti-Bush demonstrators learned of the President's change of plans. Demonstrators in both groups clustered to the north side of California Street. Plaintiffs assert that both groups had equal access to the President upon his arrival and were positioned to have equal access during his departure, had they remained in the same locations. (SAC ¶ 48.)

Prior to the President's arrival, state and local law enforcement officers cleared the alleyway behind the Inn to provide back entrance access and began restricting the movements of some of the demonstrators outside the Inn. Plaintiffs allege State and Local Defendants' law enforcement officers, dressed in riot gear, cleared the Third Street alley to the patio dining area and directly behind the Inn. Plaintiffs assert

these actions were taken at the request of a Secret Service agent. Law enforcement officers blocked Third Street, including both the sidewalk north of California Street and the California Street alley running along the east side of the Inn. Law enforcement officers were stationed at the entrance of the California Street alley to prevent any unauthorized persons from entering the alley. (SAC ¶¶ 48-49.)

The President arrived at approximately 7:15 p.m., entering the Inn's open air dining patio through a back entrance. Also present at the Inn were dozens of hotel guests and diners who were permitted to remain inside the Inn without undergoing any form of security screening. In the upstairs dining area of the Inn was a group of approximately 30 persons affiliated with a medical educational group. These individuals were not screened. Plaintiffs allege that some members were able to view the President from inside the Inn. For instance, some found an unguarded door leading into the patio dining area from where they could open the door and view the President from a distance of approximately 15 feet. (SAC ¶ 52.)

At approximately 7:30 p.m., Secret Service agents directed local and state law enforcement officers to clear California Street between Third and Fourth Streets and move all persons in that area to the east side of Fourth Street and subsequently to the east side of Fifth Street. (SAC ¶ 53.) Federal Defendants claim that the reason for the Secret Services' request to move the persons in that area was because they did not want any one within handgun or explosive range of

the President.[7] Plaintiffs assert that this security rationale is false because there was no significant security difference between the two groups—the pro-Bush demonstrators and the anti-Bush demonstrators. (SAC ¶ 55.)

At approximately 7:45 p.m. a line of police officers, including State and Local Defendants, in riot gear formed across California Street, facing the anti-Bush demonstrators. These officers made amplified announcements stating that the anti-Bush assembly was now unlawful and ordered the anti-Bush demonstrators to move. Plaintiffs allege that State and Local Defendants and law enforcement officers forcefully moved the anti-Bush demonstrators from their location without ascertaining whether the demonstrators heard or understood the announcements. In some instances, Plaintiffs allege, these officers were violent, striking some individuals with clubs and firing pepper spray bullets at them. (SAC ¶ 61.) Plaintiffs further allege that once they were moved beyond Fourth Street to Fifth Street, they were separated into two groups and law enforcement officers encircled each group, preventing some demonstrators from leaving the area. Some families were separated in the process. (SAC ¶ 61.)

Pro-Bush demonstrators were permitted to remain on the northwest and southwest corners of Third and California Streets. Plaintiffs allege that the anti-

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[7] The Secret Service's explanation of protecting the President from those within handgun or explosive range will hereinafter be referred to as the "security rationale."

Bush group was targeted by the Secret Service and these demonstrators were cleared from the area:

> even though they were much farther from the President than the unscreened diners, hotel guests, and other visitors, including the assembled medical group, inside the Inn, and even though they had no greater access to the President than the pro-Bush demonstrators. In fact, having moved the anti-Bush demonstrators two blocks east the Defendant Secret Service agents left the pro-Bush demonstrators with unimpeded access to the President along the route to the Honeymoon Cottage, demonstrating that the purported reason for moving the anti-Bush demonstrators was false.

(SAC ¶ 57.) Plaintiffs allege that neither the pro-Bush demonstrators on California Street nor the unscreened diners, hotel guests, and other visitors at the Inn were moved or screened. (SAC ¶ 58.)

Plaintiffs assert that Defendants Towe, Rodriguez, Winters and other individual defendants "personally directed and approved of the action of the police against Plaintiffs . . . and personally directed and approved of permitting the pro-Bush demonstrators and unscreened diners, guests, and visitors . . . to remain in the vicinity undisturbed and unrestricted." (SAC ¶ 96.) Further, Plaintiffs explain,

> The Police Defendants' actions and actions of the police officers in using overwhelming and excessive force, including the use of officers clad in riot gear, against unarmed, law-abiding peaceful demonstra-

> tors exercising their core First Amendment rights of speech and assembly on public sidewalks were the custom, policy or practice of the State of Oregon and Defendants City of Jacksonville and Jackson County and Municipal Does respectively, or were established as such by the individual Police Defendants in taking those actions. The individual Police Defendants had the final decision-making authority and responsibility for establishing the policies of their respective employers. The individual Police Defendants' decision to order and implement the aforesaid police actions constituted the official policy of their respective public employees.

(SAC ¶ 97.)

Plaintiffs allege that this is one of several examples of the Secret Service's policy of discriminating against First Amendment expression, in its cooperation with the Advance Team under President Bush. Plaintiffs allege,

> Since the early 1960s, each American President has employed an Advance Team to work together with the Secret Service to manage the twin goals of protecting the President and providing him access to the public in his public appearances and travels. Each President has established different policies in the balance between these two goals. The Secret Service has a long history of going beyond security measures necessary to protect the President, and manipulating its security function to protect Presidents from First Amendment-protected expressions of opposition by individuals and groups. This has

> required the courts periodically to examine and declare invalid, unlawful, or excessive, so-called security measures for which the Secret Service could not show a reasonable basis.

(SAC ¶¶ 63–64.) As further evidence of their claim, Plaintiffs point to the coordination of the Secret Service with the Advance Team and reference the "Presidential Advance Manual," dated 2002, attaching a redacted copy to the complaint.

Plaintiffs allege, "the White House under President George W. Bush, more than any prior Presidency, sought to prevent or minimize the President's exposure to dissent or opposition during his public appearances and travels, while at the same time maximizing—within the demands of reasonable security—his exposure to supporters and to the public in general." (SAC ¶ 67.) Plaintiffs allege that the Secret Service Defendants and the Advance Team under President Bush's administration worked closely together to "concoct, manipulate, and gerrymander false security rationales for the exclusion or distancing of opposition, dissent, or protest expressive activity from proximity to the President, while minimizing the distancing of the public in general and supporters." (SAC ¶ 69.)

Further, Plaintiffs allege that the Secret Service had an unwritten policy and practice to work with the White House to eliminate dissent and protest from presidential appearances. The policy was put into effect on October 14, 2004:

> there was no time for the Advance Team to take action to stifle and suppress the protest. Instead, the President's team relied on the Secret Service to do so by directing and requesting local authorities to clear [streets] where protesters opposing President Bush were congregated, while leaving undisturbed the nearby pro-Bush demonstrators, as well as the unscreened diners, hotel guests, including the assembled medical group, who were inside the Inn.

(SAC ¶ 70.)

Plaintiffs also allege that written guidelines, instructions and rules for handling demonstrations, promulgated or caused to be promulgated by the Secret Service and Defendant Basham are a sham, "designed to conceal and immunize from judicial review the actual policy and practice" as evidenced in the events on October 14, 2004. (SAC ¶ 71.) Plaintiffs allege this policy imposed greater restrictions on Plaintiffs and violated the principles of the First Amendment that prohibit viewpoint discrimination as related to pro-Bush demonstrators, content discrimination of political assemblage as related to the medical group, and content or viewpoint discrimination as related to individual guests and diners at the Inn. (SAC ¶ 73.) They allege the Secret Service's actions do not comport with normal, lawful Secret Service security measures. (SAC ¶ 78.)

Plaintiffs allege that the removal of the anti-Bush demonstrators occurred only after the President entered the dining area and heard chants of the anti-

Bush demonstrators. (SAC ¶ 77.) They assert the proposed security rationale of protecting the President from handgun or explosive range was false and the actions taken were really a part of the Bush Administration's official policy of shielding the President from seeing or hearing anti-Bush demonstrators and preventing anti-Bush demonstrators from reaching the President with their message. Plaintiffs point out that the anti-Bush demonstrators posed no greater risk and, they argue, posed less risk of assaulting the President with a handgun or explosive, than the guests, diners, and the assembled medical group inside the Inn. (SAC ¶¶ 80–81.)

Finally, Plaintiffs include a list of published reports that, they allege, show how the Secret Service has engaged in actions against anti-government expressive activity. These include President Bush's appearances at the following:

(1) March 27, 2001 at Western Michigan University in Kalamazoo, Michigan

(2) August 23, 2002 in Stockton, California

(3) January 22, 2003 in St. Louis, Missouri

(4) September 2, 2002 in Neville Island, Pennsylvania

(5) December 2002 in Philadelphia, Pennsylvania

(6) May 2003 in Omaha, Nebraska

(7) June 17, 2003 in Washington, D.C.

(8) July 2003 in Philadelphia, Pennsylvania

(9) July 4, 2004 in Charleston, West Virginia

(10) July 13, 2004 in Duluth, Minnesota

(11) August 26, 2004 in Farmington, New Mexico

(12) September 9, 2004 in Colmar, Pennsylvania (SAC ¶ 82.)

III. Legal Standards of 12(b)(6) Motion to Dismiss

Defendants filed various dispositive motions, arguing the Plaintiffs have not pled facts sufficient to state a claim for relief.

To survive dismissal for failure to state a claim pursuant to Rule 12(b)(6), a complaint must contain more than a "formulaic recitation of the elements of a cause of action;" specifically, it must contain factual allegations sufficient to "raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). To raise a right to relief above the speculative level, "[t]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id.*, quoting 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235–236 (3d ed. 2004); *see also* Fed. R. Civ. P. 8(a). Instead, the plaintiff must plead affirmative factual content, as opposed to any merely conclusory recitation that the elements of a claim have been satisfied, that "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, — U.S. —, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009). "In sum, for a com-

plaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." *Moss v. United States Secret Serv.*, 572 F.3d 962, 970 (9th Cir. 2009), citing *Iqbal*, 129 S. Ct. at 1949.

"In ruling on a 12(b)(6) motion, a court may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice." *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007). In considering a motion to dismiss, this court accepts all of the allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *See Kahle v. Gonzales*, 474 F.3d 665, 667 (9th Cir. 2007), Moreover, the court "presume[s] that general allegations embrace those specific facts that are necessary to support the claim." *Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 256, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994), *quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). The court need not, however, accept legal conclusions "cast in the form of factual allegations." *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

Recent decisions from the U.S. Supreme Court have clarified the pleading requirements under Rule 8. In 2007 the Court's decision in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), began the most recent discussion, and their decision in *Iqbal* clarified the standards further.

The Ninth Circuit carefully studied both decisions when it evaluated Defendants' interlocutory appeal related to the FAC. This court incorporates the Ninth Circuit's analysis, in part, here.

Twombly concerned a conspiracy claim under Section 1 of the Sherman Act. 550 U.S. at 548–49, 127 S. Ct. 1955. The plaintiffs had alleged facts suggesting that the defendant companies had engaged in parallel market conduct, but the plaintiffs did not allege specific facts indicating the existence of an actual agreement in restraint of trade, which was an element of the plaintiffs' cause of action. *See id.* at 553–57, 127 S. Ct. 1955. In reversing the Second Circuit's denial of the defendants' Rule 12(b)(6) motion, the Court held that an antitrust plaintiff must plead a set of facts "plausibly suggesting (not merely consistent with)" a Sherman Act violation to survive a motion to dismiss. *Id.* at 557, 127 S. Ct. 1955.

In its *Twombly* decision, the Court cautioned that it was not outright overruling *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), the foundational "notice pleading" case construing Federal Rule of Civil Procedure 8(a)(2), but it explained that *Conley's* oft-cited maxim that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley*, 355 U.S. at 45-46, 78 S. Ct. 99, read literally, set the bar too low. *See Twombly*, 550 U.S. at 561-62, 127 S. Ct. 1955. "[A]fter puzzling the profession for 50 years," the Court concluded, *Conley's* "no set of

facts" refrain "is best forgotten as an incomplete, negative gloss on an accepted pleading standard." *Id.* at 563, 127 S. Ct. 1955.

At the same time, the Court appeared to signal that *Twombly* should not be read as effecting a sea change in the law of pleadings. *Twombly* cited *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974), for the proposition that pleadings should not be found deficient even if it is apparent "that a recovery is very remote and unlikely." 550 U.S. at 556, 127 S. Ct. 1955. To add to the confusion, in *Erickson v. Pardus*, 551 U.S. 89, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007), decided shortly after *Twombly*, the Court noted that "[s]pecific facts are not necessary" for pleadings to satisfy Rule 8(a)(2). *Id.* at 93, 127 S. Ct. 2197 (citing *Twombly* (quoting *Conley*) for that proposition).

Much confusion accompanied the lower courts' initial engagement with *Twombly*. *Compare Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 n.5 (9th Cir. 2008) (stating that, at least for the purposes of antitrust cases, *Twombly* abrogated the usual "notice pleading" rule); *and ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 58 (1st Cir. 2008) (concluding that *Twombly* provided Rule 12(b)(6) with "more heft"); *with Aktieselskabet AF 21. November 2001 v. Fame Jeans*, 525 F.3d 8, 15 & n.3 (D.C. Cir. 2008) (noting disagreement among the circuits about *Twombly's* import and concluding that the case "leaves the long-standing fundamentals of notice pleading intact").

The Court addressed some of the lower courts' lingering questions in *Iqbal*, a *Bivens* action alleging (among other claims) First Amendment violations. The Court elaborated on *Twombly's* applicability in the context of a motion to dismiss based on qualified immunity.

The plaintiff in *Iqbal* a Pakistani Muslim man, was arrested and detained in the days following the attacks of September 11, 2001. 129 S. Ct. at 1942. He alleged that former Attorney General of the United States John Ashcroft and Federal Bureau of Investigation ("FBI") Director Robert Mueller, by specifically authorizing an unconstitutional detention policy, subjected him to "harsh conditions of confinement on account of his race, religion, or national origin." *Id.*

The Court first explained that "bare assertions . . . amount[ing] to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim," for the purposes of ruling on a motion to dismiss, are not entitled to an assumption of truth. *Id.* at 1951 (quoting *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955). Such allegations are not to be discounted because they are "unrealistic or nonsensical," but rather because they do nothing more than state a legal conclusion—even if that conclusion is cast in the form of a factual allegation. *Id.* Thus, in *Iqbal*, the Court assigned no weight to the plaintiff's conclusory allegation that former Attorney General Ashcroft and FBI Director Mueller knowingly and willfully subjected him to harsh conditions of confinement "solely on account of [his] religion, race, and/or national origin

and for no legitimate penological interest." *Id.* (quoting plaintiff's complaint).

After dispatching with the complaint's conclusory allegations, the Court elaborated on *Twombly's* plausibility standard. "A claim has facial plausibility," the Court explained, "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 129 S. Ct. at 1949. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (quoting *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief'" *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S. Ct. 1955).

In sum, for a complaint to survive a motion to dismiss, the non-conclusory "factual content" and reasonable inferences from that content must be plausibly suggestive of a claim entitling the plaintiff to relief. *Id.*

IV. Declaratory or Injunctive Relief Claims

This court dismissed prospective declaratory and injunctive relief claims of the FAC because "plaintiffs lack standing, plaintiffs' claim is not ripe for review, and plaintiffs have an adequate remedy at law." (2007 R & R 35.) Plaintiffs repled all claims in their SAC, including claims previously dismissed by this court, and pled new claims for declaratory relief against Federal Defendants in their official capacities.

Federal Defendants argue that because the court has previously dismissed injunctive and declaratory relief claims for lack of standing, Plaintiffs' new claim for individual-capacity equitable relief is "untenable." They argue, "Plaintiffs *also* lack standing to seek equitable relief from . . . Savage and Wood in their individual capacities (it follows, as well, that Plaintiffs' individual capacity, equitable relief claims are unripe, just as their previously asserted equitable relief claims were held by this Court to be)." (Fed. Defs.' Mem. 34.)

Though Plaintiffs have re-pled and supplemented their claims, the allegations that support claims for declaratory and injunctive relief remain materially the same. The court's previous ruling dismissed these claims, and this decision is not disturbed.

> Plaintiffs' allegations are insufficient to support a claim for equitable relief. The threat of future injury to plaintiffs is based on an extended chain of speculative contingencies and some day intentions which are insufficient to support standing. *Anoushiravani v. Fishel*, 2004 WL 1630240 at * 4 (D. Or.). The allegations in plaintiffs' complaint fail to establish that plaintiffs have standing to seek prospective relief. Although plaintiffs allege a pattern and practice of conduct by the Secret Service, plaintiffs have not alleged that they have been injured either before or after the October 14 demonstration or that they plan to demonstrate at any particular time or place in the future. Unlike the pattern and practice cases cited by plaintiffs,

plaintiffs have not shown that they have been personally injured by this alleged pattern and practice, other than at the October 14 demonstration. The lack of such allegations distinguishes this case from *Marbet v. City of Portland*, 2003 WL 23540258 (D. Or.) and other pattern and practice cases relied upon by plaintiffs. The lack of such allegations cannot be resolved by class certification.

. . .

Plaintiffs subjective feelings of inhibition to participate in future demonstrations are not sufficient. *Laird v. Tatum*, 408 U.S. 1, 13–14 [92 S. Ct. 2318, 33 L. Ed. 2d 154] (1972). Plaintiffs have not pled a real and immediate threat. The court finds both *Elend v. Sun Dome, Inc.*, 370 F. Supp. 2d 1206 (M.D. Fla. 2005) and *Acorn v. City of Philadelphia*, 2004 WL 1012693 (E.D. Pa.) persuasive and directly on point. As in those cases, plaintiffs' allegations are insufficient to support standing to seek prospective relief.

The issuance of equitable relief also requires the likelihood of substantial and immediate irreparable harm and an inadequate remedy at law. *O'Shea v. Littleton*, 414 U.S. 488, 502 [94 S. Ct. 669, 38 L. Ed. 2d 674] (1974). This requirement cannot be met where the threat of injury is conjectural and hypothetical, and there are adequate remedies at law. *Id.* The allegations in plaintiffs' complaint do not show that they have been previously subjected to the same type of conduct either before and after this incident. This is the only time they have been

> subjected to this type of treatment. Plaintiffs allegations demonstrate that plaintiffs cannot meet the requirement of showing any real or immediate threat that plaintiffs will be wronged again. *See Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1042–1044 (9th Cir. 1999). In addition, plaintiffs have a claim for damages, and, therefore, have an adequate remedy at law. *City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 113 [103 S. Ct. 1660, 75 L. Ed. 2d 675] (1983).

(2007 R & R 33–35.) Accordingly, any new claims for declaratory or injunctive relief are dismissed for the same reasons.

V. First Amendment Claims

Plaintiffs allege that all Defendants violated their First Amendment rights and seek relief under *Bivens* against Federal Defendants and under § 1983 against State, Local, and City Defendants.[8]

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[8] Section 1983 provides a civil action against *persons* who violate an individual's constitutional rights. Federal employees sued in their individual capacities may be sued for damages as well as declaratory or injunctive relief. *Hafer v. Melo*, 502 U.S. 21, 31, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). Individuals sued in their official capacities may only be sued for declaratory or injunctive relief. *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). Further, a state is not a person for the purposes of this section, but case law, however, treats municipal and local governments as "persons" under the statute and subject to damages and declaratory or injunctive relief. *Monell v. Dept. of Social Services of New York*, 436 U.S. 658, 701, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Because all injunctive relief claims were dismissed in the

A. Federal Defendants' Motion to Dismiss First Amendment Claims Is Denied

Federal Defendants filed their motion to dismiss Plaintiffs' claims against Defendants Wood, Savage, and John Doe 1 for violation of their First Amendment rights.[9] To survive the motion, Plaintiffs must plead a plausible *Bivens* claim. Plaintiffs must allege a violation of their constitutional rights by agents acting under the color of federal law. *Morgan v. U.S.*, 323 F.3d 776, 780 (2003) (citing *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971)).

A violation of First Amendment rights may result from content discrimination or viewpoint discrimination. "'Content discrimination' occurs when the government 'chooses the subjects' that may be [publicly] discussed, while 'viewpoint discrimination' occurs when the government prohibits 'speech by particular speakers,' thereby suppressing a particular view about a subject." *Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir. 2001) (alterations in the original) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 59, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) (Brennan, J., dissenting)). "'[V]iewpoint discrimination' occurs when the government prohibits 'speech by

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2007 R & R, Plaintiffs' remaining First Amendment claims under § 1983 are for damages against Defendants Rodriguez, Ruecker, Towe, Winters, Jackson County, and the City of Jacksonville.

[9] Plaintiffs include Defendant Basham in their *Bivens* claim; however, the court determined in 2007 that it did not have personal jurisdiction.

particular speakers,' thereby suppressing a particular view about a subject." *Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir. 2001) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 59, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) (Brennan, J., dissenting)); *c.f. R.A.V. v. City of St. Paul*, 505 U.S. 377, 391, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). The Supreme Court made it clear that government suppression of speech, based on the speaker's motivating ideology, opinion, or perspective is impermissible. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys."); *Mahoney v. Babbitt*, 105 F.3d 1452, 1456 (D.C. Cir. 1997) (holding that the First Amendment does not permit the federal government to bar ideological opponents from peacefully protesting on the sidewalks of Pennsylvania Avenue during President Clinton's second Inaugural Parade).

This court follows the *Iqbal* methodological approach to assess the adequacy of Plaintiffs' complaint, as the Ninth Circuit did when it evaluated the FAC on interlocutory appeal.

> A court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should as-

sume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 129 S. Ct. at 1950.

1. Summary of Ninth Circuit's Application of *Iqbal* to FAC

Because the Ninth Circuit identified areas in the FAC that it found to be deficient of the pleading the standards, regarding the *Bivens* claim, this court looks specifically at those areas and how they were sufficiently re-pled in the SAC. *See Moss*, 572 F.3d at 970-71.

First, the Ninth Circuit identified three pleadings that were not entitled to the assumption of truth, being that they were no more than legal conclusions and not supported by factual allegations. *See Iqbal*, 129 S. Ct. at 1950. These pleadings included allegations that (1) Federal Defendants acted on an impermissible motive in relocating Plaintiffs; (2) Federal Defendants ordered the relocation, acting in conformity with an officially authorized *sub rosa* Secret Service policy of suppressing speech critical of the President; and (3) there was systematic viewpoint discrimination at the highest levels of the Secret Service. *Moss*, 572 F.3d at 970.

Second, the Ninth Circuit determined that the remaining factual allegations did not plausibly suggest a claim for relief. It concluded, "[t]o prevail on their *Bivens* claim against individual Agents, Plaintiffs must establish that the Agents ordered the relocation of their demonstration *because of* not merely in spite of,

the demonstration's anti-Bush message." *Moss*, 572 F.3d at 970.

The court identified two remaining non-conclusory factual allegations. These allegations were offered to show Federal Defendants' disparate treatment towards anti-Bush demonstrators and thus evidence of discriminatory intent. However, the court concluded the following remaining allegations were not enough: (1) agents ordered the relocation of anti-Bush demonstrators but left a similarly situated pro-Bush demonstration undisturbed and (2) diners and guests inside the Inn were not subjected to the security screening or asked to leave the premises, despite their close proximity to the President. *Moss*, 572 F.3d at 971. The court explained, "the factual content contained within the complaint does not allow us to reasonably infer that the Agents ordered the relocation of Plaintiffs' demonstration because of its anti-Bush message, and therefore it fails to satisfy *Twombly* and *Iqbal*." *Id.* at 972.

2. Plaintiffs Have Pled a Plausible *Bivens* First Amendment Claim

This court now evaluates the plausibility of Plaintiffs' SAC *Bivens* claim for a violation of their First Amendment rights by the Federal Defendants acting in their individual capacities.

a. Plaintiffs Have Successfully Repled Non-Conclusory Allegations

The Ninth Circuit summed up its findings discounting specific factual allegations:

> The bald allegation of impermissible motive on the Agents' part, standing alone, is conclusory and is therefore not entitled to an assumption of truth. The same is true of Plaintiffs' allegation that, in ordering the relocation of their demonstration, the Agents acted in conformity with an officially authorized *sub rosa* Secret Service policy of suppressing speech critical of the President. The allegation of systematic viewpoint discrimination at the highest levels of the Secret Service, without *any* factual content to bolster it, is just the sort of conclusory allegation that the *Iqbal* Court deemed inadequate, and thus does nothing to enhance the plausibility of Plaintiffs' viewpoint discrimination claim against the Agents.

Moss, 572 F.3d at 970.

Plaintiffs have amended and supplemented their factual allegations. *See Id.* at 972, 975. The "legal conclusions," as identified by the Ninth Circuit in FAC, have now been supported by factual allegations and are thus entitled to an assumption of truth at this stage of the pleadings.

i. Impermissible Motive

Plaintiffs allege the Federal Defendants acted with an impermissible motive when they relocated the anti-Bush demonstrators. They suggest that the Federal Defendants' motive in moving the anti-Bush demonstrators was not based on their security rationale but based on an impermissible motive of suppressing anti-Bush demonstrators' speech, thereby violating their First Amendment rights. (SAC ¶¶ 55, 57.) Given

the additional facts alleged, this allegation is no longer a "bald legal conclusion."

The basis of Plaintiffs' allegation of impermissible motive is that the security rationale was only applied to the anti-Bush demonstrators. Defendants asserted that they relocated the anti-Bush group because they did not want anyone within handgun or explosive range of the President. (SAC ¶ 54.) From this assertion, it follows that anyone who was within handgun or explosive range of the President could expect to be relocated, screened, or at least subject to some other form of security.

On the scene that day, there were many who were in handgun or explosive range of the President, including pro-Bush and anti-Bush demonstrators and certainly guests and diners also at the Inn. All groups had the same notice of the President's arrival at the Inn. Both groups of demonstrators were nonviolent, and interactions between these two groups were "courteous and jovial." (SAC ¶ 46.)

Plaintiffs assert that there was no significant security difference between the pro-Bush and anti-Bush groups prior to the President's arrival. (SAC ¶ 54.) Further, the only difference between Plaintiffs and the other groups was the anti-Bush demonstrators' speech. (SAC ¶ 80.)

Plaintiffs also assert that the President was protected from public view, to include both groups of demonstrators, by a wooden fence, six feet in height. (SAC ¶ 51.) Plaintiffs allege the Secret Service secured the alley on California Street with law enforce-

ment officers in riot gear. Neither group of demonstrators had line of sight to the patio where the President was dining, and both groups were blocked by the buildings along California Street. (SAC ¶¶ 49, 50.) Plaintiffs also assert that the diners at the Inn posed a greater security threat to the President because they were simply closer to the President than the groups of demonstrators. (SAC ¶ 57.)

The Secret Service and other law enforcement officers, however, relocated only the pro-Bush demonstrators two block from their original location, presumably to move them outside the security perimeter and outside the handgun or explosive range. Plaintiffs argue this reason of security, however was false and was only given to cover up the impermissible motive of restricting the anti-Bush demonstrators' speech. They point out that the relocation occurred only after anti-Bush chants and slogan were heard within the patio. (SAC ¶ 53.)

The new facts alleged highlight that those permitted to stay within the security perimeter or within handgun or explosive range were those who either had no expressed view of the President or his policies or who had a positive view. (SAC ¶ 57.) For instance, the guests at the Inn were within handgun or explosive range of the President and yet were subjected to no enhanced security. Further, the pro-Bush demonstrators were able to cheer the President on his motorcade route after his meal, and some guests and diners were able to view the President while he was on

the patio from an unlocked door. (SAC ¶¶ 55–56, 62.) Plaintiffs argue,

> [i]f preventing people from being within handgun or explosive range of the President "[h]ad been the true reason for the . . . [order to move the anti-Bush demonstrators], the Defendant Secret Service agents would have requested or directed that the pro-Bush demonstrators at the corner of Third and California be moved further to the west so that they would not be in range of the President as he traveled from the Inn to the Honeymoon Cottage."

(Pls.' Mem. in Opp'n 13, citing SAC ¶ 55.)

Plaintiffs allege the anti-Bush demonstrators were targeted because of their speech. They argue this is plausibly alleged and supported when the court considers that all people within the handgun or explosive range of the President posed the same threat but only those who expressed an anti-Bush message were relocated further from the Inn and further from the President's post-dinner motorcade route.

The court agrees. The allegation that Federal Defendants acted with an impermissible motive is not a legal conclusion and is entitled to assumption of truth for the purposes of this motion.

ii. *Sub Rosa* Policy

Plaintiffs assert that the Federal Defendants were operating on a *sub rosa* policy that suppressed the speech of individuals who opposed the President or his policies. In analyzing the FAC, the Ninth Circuit

found that there was no factual support for this allegation. Plaintiffs have since asserted additional facts supporting their allegation that there was a *sub rosa* policy.

Plaintiffs generally state that the policy and practices of the Secret Service on October 14, 2004, and at other instances over the previous two years violated three principles of the First Amendment: (1) imposition of greater restrictions on Plaintiffs than on pro-Bush demonstrators outside the Inn, violating the principle of viewpoint discrimination; (2) imposition of greater restrictions on Plaintiffs than on the medical group assembled inside the Inn, violating the principle of content discrimination against political assemblage as compared to non-political assemblage; and (3) imposition of greater restrictions on Plaintiffs than on individual diners and guests inside the Inn, violating the principles that prohibit content discrimination or viewpoint discrimination against persons solely because they are assembled to express a political or opposing view. (SAC ¶ 73.)

Plaintiffs allege specifically, "[t]he Secret Service's actual but unwritten policy and practice was to work with the White House under President Bush to eliminate dissent and protest from presidential appearances." (SAC ¶ 70.) "[V]iewpoint discrimination by the Secret Service in connection with President Bush was the official policy of the White House." (SAC ¶ 68.) Plaintiffs allege that the Presidential Advance Manual, put forth by the White House Advance Team under the

Bush Administration, presents sufficient evidence of the Secret Service's unofficial policy:

> The White House under President George W. Bush, more than any prior Presidency, sought to prevent or minimize the President's exposure to dissent or opposition during his public appearances and travels, while at the same time maximizing—within the demands of reasonable security—his exposure to supporters and to the public in general. This policy was set out in some detail in the official "Presidential Advance Manual," dated October 2002, instructing the White House Advance Team on how to keep protestors out of the President's vicinity and sight. . . . The unredacted excerpts [of the Presidential Advance Manual] include discussions about how to deal with protestors, how to disrupt protests, and how to insure the protesters are kept out of sight or hearing of the President and the media. These facts demonstrate not just a pattern and practice, but an official White House policy of seeking to stifle dissent.

(SAC ¶¶ 67–68.) Plaintiffs allege that this practice and policy is evidenced by the Secret Services's actions over the preceding two years against anti-government expressive activity. (*See* SAC ¶ 82.)

Regarding the specific event on October 14, 2004, Plaintiffs allege,

> when the President's plans changed . . . , there was no time for the Advance Team to take action to stifle and suppress the protest. Instead the President's team relied on the Secret Service to do

> so by directing and requesting local authorities to clear both sides of California Street between Third and Fourth Streets, and subsequently between Third and Fifth Streets, where protesters opposing President Bush were congregated, while leaving undisturbed the nearby pro-Bush demonstrators, as well as the unscreened diners, hotel guests, and other visitors, including the assembled medical group, who were inside the Inn.

(SAC ¶ 70.) Plaintiffs argue that the Secret Service's actions "were consistent with and taken pursuant to the actual but unwritten policy and practice of the Secret Service to shield the President from seeing or hearing anti-Bush demonstrators and to prevent anti-Bush demonstrators from reaching the President with their message." (SAC ¶ 81.)

The allegation of a *sub rosa* policy is supported with the excerpts of the Advance Manual. Though this manual was not written for or by the Secret Service, Plaintiffs allege Federal Defendants were implementing this policy when they moved only anti-Bush demonstrators from the location. "[T]he Secret Service worked closely with the Advance Team to achieve the goal set out in the Presidential Advance Manual, and to concoct, manipulate, and gerrymander false security rationales for the exclusion of distancing of opposition, dissent, or protest expressive activity from proximity to the President, while minimizing the distancing of the public in general and supporters." (SAC ¶ 69.)

Specifically, the Advance Manual instructs the Advance Team in the "Preparing for Demonstrators" Section:

> There are several ways the advance person can prepare a site to minimize demonstrators. First, as always, work with the Secret Service and have them ask the local police department to designate a protest area where demonstrators can be placed, preferably not in view of the event site or motorcade route.

(SAC, Ex. B, 9.) Under "Handling Demonstrators", it explains,

> Once a group of demonstrators has been identified, the Advance person must decide what action to take. If it is determined that the media will not see or hear them and that they pose no potential disruption to the event, they can be ignored. On the other hand, if the group is carrying signs, trying to shout down the President, or has potential to cause some greater disruption to the event, action needs to be taken *immediately* to minimize the demonstrator's effect. . . . If the demonstrators appear to be a security threat notify the Secret Service immediately. If demonstrators appear likely to cause only a political disruption, it is the Advance person's responsibility to take appropriate action.

(SAC, Ex. B, 10.)

As Plaintiffs point out, Federal Defendants' actions mirrored the instructions in this Advance Manual:

only the anti-Bush demonstrators were moved, thereby "minimizing" their threat. Plaintiffs' allegation of a *sub rosa* policy and the Secret Service's involvement in training and directing agents on this policy is not conclusory.

The Federal Defendants, however, counter that the Ninth Circuit previously considered and consequently rejected Plaintiffs' claim of a *sub rosa* policy when it evaluated the sufficiency of the FAC. (Federal Defs.' Mem. in Supp. of Mot. to Dismiss ("Fed. Defs.' Mem.") 15–26.) The court disagrees with this interpretation of the Ninth Circuit decision. The Ninth Circuit found that Plaintiffs' allegation of an officially authorized *sub rosa* Secret Service policy was conclusory and needed some factual allegations if it were to be considered in the complaint's sufficiency evaluation. *Moss*, 572 F.3d at 970. The Ninth Circuit did not specifically place limitations on what allegations Plaintiffs could re-plead in their First Amendment claim. *Id.* at 974–75.

Federal Defendants also object to Plaintiffs' allegations of the dozen previous instances of the Secret Service's policy of suppressing First Amendment rights. "[T]hese other alleged incidents are entirely dissimilar to the one at issue here, and, in any event, none of them is said to have involved Defendants Savage and Wood." They argue that Wood and Savage cannot be responsible for policies allegedly promulgated by the federal agency that employs them or for the implementation of policies by fellow agents around the country. (Fed. Defs.' Mem. 14–15.)

Federal Defendants want the allegations of previous instances of viewpoint discrimination disregarded, arguing they do not support a *Bivens* claim. They explain,

> Just as those Defendants cannot be subjected to suit for the actions of others . . . so too they are not responsible for claimed "policies" allegedly promulgated by the federal agency that employs them, or for the alleged implementation of such policies by fellow agents around the country. . . . Indeed, the Supreme Court has squarely held that a *Bivens* action such as this is not the proper means to challenge the alleged policies of federal agencies.

(Fed. Defs.' Mem. 14–15.)

Federal Defendants are correct; the Supreme Court has clearly declined to extend *Bivens* actions to claims against a federal agency. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 486, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994). However, as the Ninth Circuit noted, the purpose of the allegation of a *sub rosa* policy is not to support a *Bivens* claim against the Agency but to enhance the plausibility of Plaintiffs' viewpoint discrimination claim on the whole. *See Moss*, 572 F.3d at 970.[10]

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[10] Additionally, this allegation may have a dual purpose to support Plaintiffs' claims against defendants in their official capacity, though the court previously dismissed these claims. For example, Plaintiffs are seeking declaratory and supplemental injunctive relief under 5 U.S.C. § 702 against Secret Service Defendants in their official capacities and all persons acting in the official capaci-

The court is not convinced by Federal Defendants' argument. Plaintiffs alleged that there was an unwritten policy implemented by the Federal Defendants to shield the President from anti-Bush demonstrations and messages. In support of this allegation, they have submitted excerpts of the Advance Manual describing measures to shield the President and have alleged in what ways these instructions were implemented in Jacksonville and in other areas of the country over the preceding two years. What the Ninth Circuit found as a conclusory allegation in the FAC, has been repled in the SAC to be non-conclusory.

iii. Systematic Viewpoint Discrimination

The Ninth Circuit saw no merit in the FAC's assertion of systematic viewpoint discrimination. The court noted, "the allegation of systematic viewpoint discrimination at the highest level of the Secret Service, without *any* factual content to bolster it, is just the sort of conclusory allegation that the *Iqbal* Court deemed inadequate." *Moss*, 572 F.3d at 970.

Factual support has been added to the SAC to bolster this allegation. Plaintiffs added support with allegations based on the Advance Manual, the Advance Manual itself attached to the complaint, and the alleged similar instances of speech suppression across the country over the preceding two years. Plaintiffs' systematic viewpoint discrimination allegation is supported by factual content and thus is worthy of as-

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ties, though the court declines to revisit its prior ruling. (SAC ¶ 105.)

sumption of truth. This is enough, at this stage of the litigation, to raise the conclusory allegation in the FAC to one in the SAC that is entitled to assumption of truth.

b. Non-Conclusory Factual Allegations Suggest a Plausible *Bivens* First Amendment Claim

Viewing all the factual allegations entitled to assumption of truth in the SAC, including those noted above, Plaintiffs have pled a plausible claim. For pleading purposes, the court can reasonably infer a First Amendment violation based on these alleged facts.

i. Disparate Treatment as Related to Pro-Bush Demonstrators

Plaintiffs have plausibly alleged disparate treatment to support their claim of discriminatory intent. Plaintiffs asserted that the Secret Service's security rationale was false, arguing it was a sham, designed for the purpose to relocate the Plaintiffs. As proof, they point out that anti-Bush demonstrators were treated differently than the other groups. They allege that they were the only ones subject to the security measures and support this with their allegation that others also within handgun or explosive range were not relocated or subjected to any security measures. Individuals who were within this proximity to the President included both pro- and anti-Bush demonstrators as well as guests and diners at the Inn. Further, both groups of demonstrators were blocked from the President by buildings along California Street. (SAC ¶ 50.) However, it was only the anti-

Bush demonstrators who were moved or subjected to any kind of security measures. Plaintiffs argue this shows that they were treated differently because of their views.

Plaintiffs allege several new facts in the SAC to remedy what the Ninth Circuit found deficient in their FAC. The Ninth Circuit found that there was no plausible disparate treatment claim based only the relocation of one block from Third to Fourth Street.

> The complaint alleges that the Agents instructed state and local police to move "all persons" between Third and Fourth Streets to the east side of Fourth Street, a position roughly the same distance from the Inn's patio dining area as the Pro-Bush demonstration, and that in issuing that order, the Agents explained their desire to ensure that no protestors remained in handgun or explosive range of the President. . . . If the Agents' motive in moving Plaintiffs away from the Inn was—contrary to the explanation they provided to state and local police—suppression of Plaintiffs' anti-Bush message, then presumably they would have ensured that demonstrators were moved to an area where the President could not hear their demonstration, or at least to an area farther from the Inn then the position that the pro-Bush demonstrators occupied. Instead, according to the complaint, the Agents simply instructed state and local police to move the anti-Bush protestors to a location situated a comparable distance from the Inn as the other demonstrators, thereby establishing a consistent perime-

> ter around the President. This is not a plausible allegation of disparate treatment.

Moss, 572 F.3d at 971.

Taking note of the Ninth Circuit's opinion, Plaintiffs amended their complaint and alleged, "Secret Service Defendants Wood, Savage, and John Doe 1 requested or directed Defendant Towe and the other Police Defendants to clear California Street of all persons between Third and Fourth Streets—that is, the members of Plaintiff Class—and to move them to the east side of Fourth Street and *subsequently to the east side of Fifth Street.*" (SAC ¶ 53 (emphasis added).) Further, they allege the police forcibly moved the anti-Bush group from where they were demonstrating "east along California Street until they had all crossed Fourth Street, and then to the east side of Fifth Street." (SAC ¶ 61.)

Plaintiffs argue,

> Had that been the true reason [that is, Secret Service did not want anyone within handgun or explosive range of the President] for the request or direction, the Defendant Secret Service agents would have requested or directed that all persons dining, staying at, or visiting the Inn who had not been screened by the Secret Service or the Police Defendants be removed from the Inn. Likewise, had that been the true reason . . . , the Defendant Secret Service agents would have requested or directed that the pro-Bush demonstrators at the corner of Third and California be moved further west so that they would not be in range of the

> President as he traveled from the Inn to the Honeymoon Cottage where he was staying. . . . Instead, the Defendant Secret Service agents left the pro-Bush demonstrators on the Northwest and Southwest corners of Third and California Streets . . . to cheer for President Bush as he traveled to the Honeymoon Cottage, while causing the anti-Bush demonstrators to be violently moved two blocks east, well out of the President's view. . . . In fact, having moved the anti-Bush demonstrators two blocks east, the Defendant Secret Service agents left the pro-Bush demonstrators with unimpeded access to the President along the route to the Honeymoon Cottage.

(SAC ¶¶ 55–56.)

Federal Defendants argue that Plaintiffs' additional allegations do not impact the Ninth Circuit's conclusion that there is no plausible claim. On the allegation of disparate treatment, Federal Defendants stress that the law requires that the two groups be similarly situated, not identically situated. They argue,

> If the Ninth Circuit could not plausibly infer viewpoint discrimination based on Defendants' alleged request to relocate Plaintiffs to the east side of Fourth Street, then viewpoint discrimination cannot be plausibly inferred based on a new allegation that the dispersal order actually extended a mere block further. Even at Fifth Street, Plaintiffs were still, in the Ninth Circuit's words, in "a position roughly the same distance from the Inn's patio dining area as the Pro-Bush demonstration" and "situated" at a

> "comparable distance from the Inn as the other demonstrators."

(Fed. Defs.' Mem. 16; citing *Moss*, 572 F.3d at 971.) Federal Defendants argue that this additional allegation does not push the complaint from merely possible to plausible.

While the court agrees that "similarly situated" does not necessarily require the groups to be "identically situated," Plaintiffs have alleged facts that the groups were not similarly situated after the relocation. Both pro- and anti-Bush demonstrators had equal access during the President's arrival and would have had equal access had they not been subject to the security rationale. (SAC ¶ 48.) In fact, after the move, the anti-Bush group was more than twice the distance from the President's hearing range than the pro-Bush group. (Pls.' Mem. in Opp'n 12.) The other supported factual allegations tip the balance to plausible, specifically Plaintiffs' allegation of the falsity of Defendants' security rationale. Plaintiffs allege that "contrary to the assertion of [defendants] there is no line of sight to the patio restaurant from the sidewalks of California Street" and that Federal Defendants "gerrymander[ed] their 'security zone'" to exclude anti-Bush demonstrators. (Pls.' Mem. in Opp'n 6, *citing* SAC ¶¶ 69, 51.)

As to Federal Defendants' argument that the claim is not plausible because Plaintiffs have not alleged that the President was unable to hear their speech from their location, Defendants have not shown that this is dispositive of Plaintiffs' claim. (Fed. Defs.' Mem. 16.)

Even so, the Advance Manual supports the alleged motive to move anti-Bush demonstrators from the hearing range of the President. (SAC, Ex. B, 10.) Plaintiffs allege that the agents acted with the impermissible motive to suppress anti-Bush demonstrators' speech. This can be plausibly alleged without an allegation that their speech was not heard.

ii. Disparate Treatment as Related to Diners and Guests at Inn

Plaintiffs allege that they were treated differently than the diners and guests at the Inn. They argue that, while the anti-Bush demonstrators were pushed two blocks to Fifth Street, the diners and guests were unaffected even though they were also within handgun or explosive range of the President and had the same amount of notice of the President's decision to dine at the Inn.

Plaintiffs allege that despite this purported risk from all individuals within this proximity, "[d]uring the entire time these actions were being taken against Plaintiffs . . . members, the Defendants did not take any action to move the pro-Bush demonstrators or move the unscreened diners, hotel guests, and other visitors, including the assembled medical group, who were inside the Inn." (SAC 162.)

Plaintiffs made a similar allegation in the FAC, but the Ninth Circuit did not find it supportive of a plausible claim. The court distinguished the diners and guests because this combined group was not engaged in expressive activity. Commenting on the allega-

tions of the FAC, the court relied on its decision in *Menotti v. City of Seattle:*

> Again, the crux of Plaintiffs' complaint is that the differential treatment of similarly situated pro-Bush and anti-Bush demonstrators *reveals* that the Agents had an impermissible motive—suppressing Plaintiffs' anti-Bush viewpoint. The differential treatment of diners and guests in the Inn, who did not engage in expressive activity of any kind and were not located in public areas outside the Inn, however, offers little if any support for such an inference. *See Menotti v. City of Seattle*, 409 F.3d 1113, 1130 (9th Cir. 2005).

Moss, 572 F.3d at 971.

This court, however, respectfully views the crux of the SAC somewhat differently than the Ninth Circuit. Plaintiffs allege that they were treated differently than all other groups who were within explosive or handgun range of the President. As Plaintiffs explained, "[i]t is not that the differential treatment for anti-Bush protestors and the diners and guests at the Inn directly demonstrates viewpoint discrimination. Rather, it is that the differential treatment demonstrates the falsity of the security rationale offered by [Federal Defendants]." (Pls.' Mem. in Opp'n 14.)

Accordingly, the question this court considers is whether the differential treatment of anti-Bush demonstrators compared to all other groups within handgun and explosive range reveals the Federal Defendants had an impermissible motive.

The issue in *Menotti* is distinguishable from the issue here. In *Menotti*, the plaintiffs sued the City of Seattle for violation of their constitutional rights based on an emergency order enacted by the City during the 1999 World Trade Organization (WTO) Conference. 409 F.3d at 1118 (9th Cir. 2005). The ordinance was created as a direct result of the violence and unrest of protestors. It was undisputed that the actions of a small group of violent protestors put WTO delegates, police officers, the general public, and other demonstrators at risk. *Id.* at 1122–23. The mayor of Seattle declared a civil emergency on November 30, 1999, and signed the Local Proclamation of Civil Emergency Order Number 3 ("Order No. 3"). The order had the following effect:

> all persons, subject to limited exceptions, were prohibited from entering the portion of downtown Seattle described. . . . The exceptions to the prohibition on entering the restricted zone were granted for: (1) delegates and personnel authorized by the WTO to participate in official WTO functions; (2) employees and owners of businesses within the restricted area and other personnel necessary to the operation of those businesses; and (3) emergency and public safety personnel.

Id. at 1125. Persons could not protest in support of or against any topic within the restricted zone.

The plaintiffs in *Menotti* attacked Order No. 3 as unconstitutional on its face, but the Ninth Circuit disagreed: "[t]he purpose of enacting Order No. 3 had everything to do with the need to restore and maintain

civic order, and nothing to do with the content of [Plaintiffs'] message." *Id.* at 1129. It concluded,

> [t]he exemptions permitted shoppers and downtown workers to go about their business in the restricted zone and did not enable the City to discriminate against any persons on the basis of their views. Further, there is no evidence that those persons who were permitted to enter the restricted zone were part of the security problem that prompted the adoption of Order No. 3.

Id. at 1120.

In *Moss*, the corollary to Order No. 3 is the Secret Service proposed security rationale that they did not want any person within handgun or explosive range of the President. However, unlike *Menotti*, there was neither violence by any demonstrator nor was there an order of civil emergency.

The threat to the President's security here, as implied by the security rationale, came simply from the *proximity* of persons to the President. In *Menotti*, the threat was created by actual violence. When the shoppers and business owners were exempted from security measures in Seattle, it was because they were not a part of the security problem. 409 F.3d at 1130. The position of the shoppers and business owners is not the same as the position of the diners and guests here. Their proximity to the President makes them a part of the security problem, political views notwithstanding. They received different and, arguably, better treatment than the anti-Bush demonstrators as

shown by the fact that they were neither relocated nor screened.

That the diners and guests were not expressing a political view is immaterial to the fact that their proximity made them a potential threat to the President's safety. As Plaintiffs described,

> surely they posed a greater risk of assaulting the President with a handgun or explosive than the anti-Bush demonstrators outside the Inn, separated from and blocked from even seeing the President by the Inn itself and other buildings on California Street.

(Pls.' Mem. in Opp'n 15.)

The court acknowledges and respects the experience and intelligence of the Secret Service and the inherent danger and grave responsibility involved in protecting the President. In no way is this court suggesting that it knows how to do the job of a Secret Service agent. Further, it is not proposing that it knows a better solution for how to protect the President in such a situation.

However, after reviewing the security rationale and its application, the court notes that there were no actions taken to protect the President from potential threats of the diners and guests at the Inn, even though their proximity logically posed a threat to the President, if the court applies the security rationale to everyone and not just the anti-Bush demonstrators. The absence of any measures thus supports Plaintiffs' allegation that the security rationale was false, and

this falsity supports Plaintiffs' allegations of improper purpose and viewpoint discrimination. Plaintiffs have plausibly alleged that they were subject to disparate treatment because of, not merely in spite of, their political views.

3. Federal Defendants Do Not Have Qualified Immunity

Plaintiffs argue that even if they did violate Plaintiffs' constitutional rights, they have qualified immunity. Determining whether government officials are entitled to qualified immunity involves a two-step inquiry. At step 1, the court asks whether, taken in the light most favorable to the party asserting the injury, the facts alleged show the officer's conduct violated a constitutional right. And, at step 2, the court asks whether the right was clearly established in light of the specific context of the case. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S. Ct. 2508, 153 L. Ed. 2d 666 (2002) (internal quotation marks omitted).

As previously discussed, Plaintiffs have pled a plausible *Bivens* claim against Federal Defendants. Accordingly, the analysis now moves to step 2. Neither a 42 U.S.C. § 1983 nor a *Bivens* action will hold a supervisor strictly vicariously liable for the actions of his subordinates under a theory of respondeat superior. *Iqbal*, 129 S. Ct. at 1948. Although this question is a

part of the substance of § 1983 and *Bivens* liability, it is also a proper component of the qualified immunity inquiry:

> In conducting a qualified immunity analysis . . . , courts do not merely ask whether, taking the plaintiff's allegations as true, the plaintiff's clearly established rights were violated. Rather, courts must consider as well whether each defendant's alleged conduct violated the plaintiff's clearly established rights. For instance, an allegation that Defendant A violated a plaintiff's clearly established rights does nothing to overcome Defendant B's assertion of qualified immunity, absent some allegation that Defendant B was responsible for Defendant A's conduct.

Hope, 536 U.S. at 751 n.9, 122 S. Ct. 2508 (Thomas, J., dissenting).

In *Kwai Fun Wong v. United States*, the Ninth Circuit, on interlocutory appeal, dismissed part of a *Bivens* action for failure to state a claim where the complaint "fails to identify what role, if any, each individual defendant had in placing [the plaintiff] in detention." 373 F.3d 952, 966 (9th Cir. 2004).

Further, the Ninth Circuit explained in *al-Kidd v. Ashcroft* that "direct, personal participation is not necessary to establish liability for a constitutional violation." 580 F.3d 949, 965 (9th Cir. 2009) (citing *Kwai Fun Wong*, 373 F.3d at 966). Supervisors can be held liable for the actions of their subordinates (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by

others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinates; or (4) for conduct that shows a "reckless or callous indifference to the rights of others." *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (internal citations and quotation omitted). Any one of these bases will suffice to establish the personal involvement of the defendant in the constitutional violation.

Plaintiffs have sued Defendants Wood, Savage, and John Doe 1 in their individual capacities. Plaintiffs allege,

> Defendants Tim Wood, Rob Savage, and John Doe 1 at all times material hereto, were Secret Service agents at the scene of the demonstration, acting within the scope of their employment and under color of law, assigned to provide security for the President, and directing, requesting and communicating with the other Defendants in their operations related to the demonstration. Defendants Wood, Savage, and Doe 1 are sued in their official and individual capacities.

(SAC ¶¶ 16–17.) Plaintiffs' first claim for relief states,

> The individual Secret Service Defendants, except Defendant Sullivan, are liable in their individual or personal capacities to Plaintiffs and Plaintiff Class . . . for compensatory damages under *Bivens v.*

> *Six Unknown Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), for the violation of their rights of freedom of speech, assembly, and association under the First Amendment. . . . [Wood, Savage, and John Doe I] acted willfully and maliciously, or with indifference or reckless disregard of Plaintiff Class members' rights or safety, and Plaintiffs and Plaintiff Class . . . are therefore entitled to an award of punitive damages against the individual Secret Service Defendants in their individual capacities, except Defendant Sullivan, in an amount to be established at trial.

(SAC ¶¶ 102–03.)

Plaintiffs claim that Defendants Wood, Savage, and John Doe 1 "requested or directed" the local law enforcement officers to clear California Street between Third and Fourth Streets. (SAC ¶ 53.) They also allege that these Defendants proposed the security rationale that violated Plaintiffs' First Amendment rights for viewpoint discrimination. The Federal Defendants then allowed the pro-Bush demonstrators to remain, undisturbed, to cheer on the President's motorcade while targeting the anti-Bush demonstrators and moving them further from the route. (SAC ¶¶ 56–58, 70.) They also allege that the Secret Service, headed by Defendant Basham,

> worked closely with the Advance Team to achieve the goal set out in the Presidential Advance Manual, and to concoct, manipulate, and gerrymander false security rationales for the exclusion or distancing of opposition, dissent, or protest expressive

> activity from proximity to the President, while minimizing the distancing of the public in general and supporters.

(¶ SAC 69.) Plaintiffs also allege Wood, Savage, and John Doe 1

> have promulgated or caused to be promulgated written guidelines, directives, instructions and rules which purport to prohibit Secret Service agents from discriminating between anti-government and pro-government demonstrators, between demonstrators and others engaged in expressive assembly, and between demonstrators and members of the public not engaged in expressive assembly, but these documents do not represent the actual policy and practice of the Secret Service, and are a sham, designed to conceal and immunize from judicial review the actual policy and practice [described herein]. The actions of the Secret Service Defendants during the episode at the Jacksonville Inn on October 14, 2004, were an implementation of this actual policy and practice, which included employing, directing, requesting, or encouraging state and local authorities to assist in implementing the discriminatory policy.

(SAC ¶¶ 71–72.)

Federal Defendants argue that they have qualified immunity because Plaintiffs' First Amendment rights were not clearly established at the time and the Federal Defendants' conduct on that day was reasonable. (Fed. Defs.' Mem. 15–16.)

In their view, "two public servants made an entirely reasonable and lawful judgment call for the purpose of protecting the President . . . in the challenging context of the President's public appearance at an unfamiliar location." This was an "exceedingly difficult and sensitive task" and "[u]ltimately Defendants saw fit to clear the single block directly in front of the President's location and where Plaintiffs happened to be present." (Fed. Defs.' Mem. 18.) They stress the small window of time in which Federal Defendants had to make a decision and note, "in the unique circumstances confronting them, their common-sense, on-the-spot judgment call was eminently reasonable." (Fed. Defs.' Mem. 19.)

Federal Defendants also strongly advocate for qualified immunity here for the public interests of the qualified immunity doctrine itself. They argue that denying them immunity would have far-reaching effects: "for the court to hold otherwise . . . would run the risk of causing Secret Service agents, generally, to hesitate when in the field with the President over taking a protective action they reasonably believe to be necessary." (Fed. Defs.' Mem. 20.) Rather than considering this incident and its specific context, Federal Defendants ask the court to consider the future impact:

> They ought *not* to be distracted by any concern, that if they take a particular protective action in the field that they reasonably perceive to be necessary (as was the case here), this will mire them in meritless litigation and subject them to potentially disa-

> bling threats of liability. But subjecting Defendants Savage and Wood to suit on *these* allegations would pose precisely this risk.

(Fed. Defs.' Mem. 21 (citations omitted).) Further, they argue that if liability were extended here,

> any agent in the field would potentially second-guess himself or herself—and delay any action at all, possibly to the President's detriment—by pausing to wonder if he or she should *also* remove other individuals who might be in or near the general areas of the President but who are not similarly situated to the large crowd.

(Fed. Defs.' Mem. 22.)

Despite Federal Defendants' arguments, the court is not convinced. The court has applied the standards of a Rule 12(b)(6) motion, and Plaintiffs have plausibly alleged that their First Amendment rights were clearly established during their demonstration in Jacksonville, Oregon.

The court construes all the plausible allegations in the light most favorable to Plaintiffs, as the non-moving party. These allegations, at their essence, assert that the anti-Bush demonstrators were exercising their First Amendment right on October 14, 2004, in demonstrating against the President and his policies. Plaintiffs alleged that it was only the anti-Bush demonstrators who were subject to a security rationale and who were dispersed and moved up to two blocks from the President. They allege the pro-Bush demonstrators and guests and diners at the Inn were not

subjected to security measures. *See* Part V.A.2(b). Taking these allegations as true, Plaintiffs have asserted they were discriminated against and effectively targeted because of their anti-Bush speech in direct a violation of their First Amendment rights. A reasonable officer would have been aware that targeting and moving this group based solely on their speech, violated their established rights.

Plaintiffs have identified the roles of Wood and Savage played in the actions that violated the anti-Bush demonstrators' rights on October 14. *See Kwai Fun Wong*, 373 F.3d at 966. Plaintiffs allege they were on the scene in Jacksonville and requested or directed that the pro-Bush demonstrators be moved. They also allege it was their proposed security rationale that discriminated against anti-Bush demonstrators. Plaintiffs have plausibly alleged their conduct violated their rights.

Construing only the plausible allegations in the light most favorable to Plaintiffs, Plaintiffs have alleged there was a *sub rosa* policy in place that limited expressive activity, and Plaintiffs' First Amendment rights. *See* Part V.B.1.b. Plaintiffs have plausibly alleged that their First Amendment rights were clearly established and that the Federal Defendants participated in actions that violated these clearly established rights. Federal Defendants Wood and Savage are not entitled to qualified immunity. The Federal Defendants' motion to dismiss the *Bivens* claim for violation of First Amendment rights should be denied.

B. State Defendants' Motion to Dismiss the § 1983 First Amendment Claim Is Granted

The court now considers Plaintiffs' 42 U.S.C. § 1983 claims against State Police Defendants in their individual capacities.

1. Plaintiffs Have Not Pled a Plausible § 1983 First Amendment Claim

This court applies the Court's methodological approach in *Ashcroft v. Iqbal*, — U.S. —, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009). *See* Part V.B.

To prevail on a claim for relief under 42 U.S.C. § 1983, Plaintiffs must plausibly plead two elements: "(1) that the Defendants acted under color of state law; and (2) that the Defendants caused them to be deprived of a right secured by the Constitution and laws of the United States." *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997). Because State Defendants do not dispute that they acted under color of state law, the issue here is whether Plaintiffs have satisfactorily pled that Rodriguez or Ruecker violated Plaintiffs' federal or constitutional rights.

Plaintiffs have pled that State Defendants Rodriguez and Ruecker, deprived them of their First Amendment constitutional rights through content or viewpoint discrimination. (SAC ¶ 99; Pls.' Mem. in Opp'n 24.) As discussed above, "'[c]ontent discrimination' occurs when the government 'chooses the subjects' that may be [publicly] discussed, while 'viewpoint discrimination' occurs when the government prohibits 'speech by particular speakers,' thereby sup-

pressing a particular view about a subject." *Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir. 2001) (alterations in the original) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 59, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) (Brennan, J., dissenting)). Viewpoint discrimination violates an individual's First Amendment rights. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992).

To survive State Police Defendants' motion to dismiss, Plaintiffs must plausibly plead that Rodriguez and Ruecker "acted with discriminatory purpose" during their challenged conduct; that is, they engaged in viewpoint or content discrimination because of, not merely in spite of, discriminatory effects on Plaintiffs. *See Iqbal*, 129 S. Ct. at 1948 (internal citations omitted). As previously discussed, "[P]urposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.' It instead involves a decisionmaker's undertaking a course of action because of, not merely in spite of [the action's] adverse effects upon an identifiable group." *Iqbal*, 129 S. Ct. at 1948 (internal quotations and citations omitted).

Plaintiffs must also plausibly plead personal conduct by Rodriguez and Ruecker that violated Plaintiffs' First Amendment rights. *See al-Kidd v. Ashcroft*, 580 F.3d 949, 964 (9th Cir. 2009). Section 1983 will not "hold a supervisor strictly vicariously liable for the actions of his subordinates." *al-Kidd*, 580 F.3d at 964. Yet, "direct, personal participation is not necessary to establish liability for a constitutional violation."

"Supervisors can be held liable for the actions of their subordinates (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinates; or (4) for conduct that shows a 'reckless or callous indifference to the rights of others.'" *Id.* at 965 (citing and quoting *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991)).

a. Conclusory Allegations Are Disregarded

"[B]are assertions" that amount to "nothing more than a formulaic recitation of the elements of a constitutional discrimination claim" do not survive a motion to dismiss. *Iqbal*, 129 S. Ct. at 1951 (internal quotation and citation omitted). The opinion in *Iqbal* provides an illustrative analysis of a constitutional discrimination claim that was too conclusory to survive a motion to dismiss.

> [R]espondent plead[ed] that petitioners 'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.' . . . The complaint alleges that [Petitioner] Ashcroft was the 'principal architect' of this invidious policy . . . and that [Petitioner] Mueller was 'instrumental' in adopting and executing it.

Id. at 1950–51. The Ninth Circuit found that these allegations, without further support, were "bare assertions" that amounted to "nothing more than a formulaic recitation of the elements of a constitutional discrimination claim." *Id.* (internal quotation and citation omitted).

Here, like in *Iqbal* the court should disregard some of Plaintiffs' allegations because they amount only to a "formulaic recitation of the elements of a constitutional discrimination claim;" they are unsupported by allegations of specific culpable actions taken individually by either Rodriguez or Ruecker that violated Plaintiffs' constitutional rights. (*See, e.g.* SAC ¶¶ 96, 99, 109.) First, paragraph 96 does not equal more than a formulaic recitation of elements. It alleges that "the individual State Police Defendants *personally directed and approved* of the actions of the police against Plaintiff Class, and *personally directed and approved* of permitting the pro-Bush demonstrators and unscreened diners, guests, and visitors . . . to remain in the vicinity undisturbed and unrestricted." (SAC ¶ 96 (emphasis added).) As Plaintiffs have openly conveyed (*see* Pls.' Mem. in Opp'n 24), Plaintiffs crafted paragraph 96 of the SAC in an attempt to satisfy the requirements of *al-Kidd*, which requires plaintiffs to plead personal conduct by defendants that violated plaintiffs' constitutional rights:

> Defendants Ruecker and Rodriguez are 'liable for the actions of their subordinates (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which

> they knew or reasonably should have known would cause others to inflict constitutional injury; [and] (2) for culpable action or inaction in training, supervision, or control of subordinates' in connection with the execution of the Secret Service's direction and request to remove the anti-Bush protestors from the vicinity of the Inn.

(Pls.' Mem. in Opp'n 24 (citing *al-Kidd*, 580 F.3d at 965).) Yet, because Plaintiffs fail to support paragraph 96 with any factual content regarding when, how, or from where Rodriguez and Ruecker "personally directed and approved of the various activities that resulted in the alleged discrimination, paragraph 96's allegations are conclusory and the court should disregard them.

Second, the court should not consider Plaintiffs' allegations in paragraphs 99 and 109 of the SAC because there Plaintiffs again only offer recitations of the elements of their First Amendment claim without factual support. In paragraph 99 of the SAC, Plaintiffs conclusorily allege that

> actions against Plaintiff Class in discriminating against them based on the fact, content, and/or viewpoint of their expression . . . were the result of improper training, supervision, instruction and discipline of . . . the police officers under the personal directions of the State . . . Police Defendants By the practice or custom of failing to adequately and properly train, supervise, instruct, or discipline their police officers, the De-

fendants have directly caused the violations of rights that are the subject of this action.

(SAC ¶ 99.) In paragraph 109 of the SAC, Plaintiffs allege, "The individual Police Defendants . . . acted willfully and maliciously, or with indifference or reckless disregard of Plaintiff Class Members' rights or safety." Neither paragraph is supported by factual allegations. Such conclusory allegations fail to state a claim against Rodriguez or Ruecker on which relief can be granted. *See Iqbal*, 129 S. Ct. at 1951.

b. Plaintiffs' Remaining Allegations Do Not Plead a Plausible Section 1983 Claim Against Rodriguez or Ruecker

Plaintiffs do not plead a plausible violation of Plaintiffs' First Amendment rights by Rodriguez or Ruecker, and consequently, the section 1983 claim against those individuals should be dismissed. *See Iqbal*, 129 S. Ct. at 1949; *see* Part III and Part V.A.2.b, *supra*.

To survive State Defendants' motion to dismiss, Plaintiffs must plead factual content that plausibly suggests personal conduct based on discriminatory purpose by either Rodriguez or Ruecker. In order "[t]o state a claim based on a violation of a clearly established right [in the context of a First Amendment discrimination claim], respondent must plead sufficient factual matter to show that petitioners adopted and implemented the . . . policies at issue not for a neutral . . . reason but for the purpose of discriminating. . . ." *Iqbal*, 129 S. Ct. at 1948–49.

Here, Plaintiffs' allegations do not plausibly allege that Rodriguez and Ruecker's conduct was motivated by a discriminatory purpose. First, Plaintiffs' allegations of negligence, which are the primary focus of their allegations in support of their First Amendment claim, are irrelevant for a showing of the requisite discriminatory purpose. Rather than pleading facts that plausibly suggest some discriminatory purpose behind Rodriguez and Ruecker's actions, Plaintiffs allege and give some facts supporting that "the Police Defendants knew or should have known" that the Federal Police Defendants were themselves acting with discriminatory purpose when they requested or directed the State Police Defendants to move Plaintiffs down the street. (*See* SAC ¶¶ 53–55.)[11] Plaintiffs further assert that "Defendants should not be permitted to hide behind the directions and requests of the Secret Service [to move the anti-Bush demonstrators] as an excuse for blatant viewpoint and content discrimination in violation of the First Amendment." (Pls.' Mem. in Opp'n 24.) These allegations do not support discriminatory intent and are irrelevant to a § 1983 claim.

Second, Plaintiffs' allegations on the whole indicate that the decision to move the anti-Bush demonstrators

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[11] State Police Defendants assert that the Secret Service agents told them that the reason for moving the anti-Bush demonstrators down California Street was to prevent anyone from being "within handgun or explosive range of the President." (SAC ¶ 54.) In response, Plaintiffs allege that "the Police Defendants knew or should have known that [this reason] was false." (SAC ¶ 55.)

and not to move or screen other groups or individuals rested solely with the Secret Service, not with State Defendants. (*See, e.g.*, SAC ¶¶ 53–54, 56–59; State Defs.' Mem. in Supp. 12–13.) As State Defendants assert, the allegations against them indicate no purpose on their part other than to carry out the Secret Service's directions. (*See* State Defs.' Mem. in Supp. 12–13.)

Third, Plaintiffs' allegations do not tend to rule out more likely explanations that do not involve a discriminatory purpose for why State Defendants complied with the Secret Service's alleged requests to relocate the anti-Bush demonstrators. (*See* SAC ¶¶ 59–60); *Iqbal*, 129 S. Ct. at 1951 ("[G]iven more likely explanations, [the pleadings] do not plausibly establish this purpose."). Common sense suggests there are other more likely explanations for Rodriguez and Ruecker's choice to follow the Secret Service's requests. *See Iqbal*, 129 S. Ct. at 1950 ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.") (internal citation omitted). Arguably, Rodriguez and Ruecker determined that the Secret Service officers, who have the specialized job to protect the President, had superior knowledge about threats to the President's safety. Few rationale police officers would second-guess a request by the Secret Service for a specific action when there is a presidential security concern. (*See* SAC ¶ 54.) These more likely explanations for the State Defendants' conduct weigh against the plausibility of Plaintiffs' § 1983 First

Amendment claim against. *See Twombly*, 550 U.S. at 566–69, 127 S. Ct. 1955 (acknowledging that defendant's parallel conduct was consistent with an unlawful agreement in violation of the Sherman Act, but nevertheless concluding that parallel conduct did not plausibly suggest an illegal agreement because it was not only compatible with, but indeed more likely explained by, lawful, unchoreographed free-market behavior).

Plaintiffs do not plead a plausible First Amendment claim under 42 U.S.C. § 1983 against Rodriguez and Ruecker. The court should grant State Police Defendants' motion and dismiss this claim.

2. State Defendants Have Qualified Immunity

Rodriguez and Ruecker are entitled to qualified immunity. For this additional reason, Plaintiffs' § 1983 claim against State Police Defendants in their individual capacities for violations of Plaintiffs' First Amendment rights should be dismissed.

As previously explained, to overcome qualified immunity, Plaintiffs must plead facts that plausibly satisfy both prongs of the qualified immunity analysis: (1) that the officers' conduct violated Plaintiffs' constitutional rights and (2) the contours of the right are sufficiently clear such that a reasonable officer would understand he is violating this right. *See Saucier*, 533 U.S. at 201, 121 S. Ct. 2151; *Iqbal*, 129 S. Ct. at 1950; *see* Part V.A.3, *supra*.

As discussed above, Plaintiffs failed to plausibly plead that Rodriguez and Ruecker's personal conduct violated Plaintiffs' First Amendment rights through

viewpoint or content discrimination. While the qualified immunity inquiry could end here, *see Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987) the court considers for the sake of argument whether Plaintiffs' allegations overcome the second prong of the qualified immunity analysis.

To overcome the second prong of qualified immunity, Plaintiffs must plead facts that plausibly suggest that "'[t]he contours of the right [are] sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right.'" *See Saucier*, 533 U.S. at 202, 121 S. Ct. 2151 (citing *Anderson*, 483 U.S. at 640, 107 S. Ct. 3034); *Iqbal*, 129 S. Ct. at 1950. This clarity depends in part on the state of the law at the time of the challenged conduct. *See Saucier*, 533 U.S. at 202, 121 S. Ct. 2151. If the law were such that it would not be clear to a reasonable officer that his conduct was unlawful, then summary judgment for the defendant based on qualified immunity is appropriate. *Id.* 533 U.S. at 202, 121 S. Ct. 2151 (citing *Malley v. Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986) (declaring that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law")). In ruling on this issue from the FAC in 2007, this court noted that at the time of State Defendants' challenged conduct in 2004, it was "clearly established" that viewpoint discrimination violates the First Amendment. *Moss v. U.S. Secret Service*, 2007 WL 2915608 at * 20 (D. Or., Oct. 7, 2007) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (finding that the

government cannot regulate speech based upon its content or favor one viewpoint over another)).

The clarity of the constitutional right also depends on whether a reasonable officer could believe that the challenged law enforcement conduct was lawful "in light of . . . the information the . . . officers possessed" at the time of the challenged conduct. *Anderson*, 483 U.S. at 641, 107 S. Ct. 3034 (1987); *accord Bilida v. McCleod*, 211 F.3d 166, 174 (1st Cir. 2000) (citing *Anderson*, 483 U.S. at 641, 107 S. Ct. 3034, and explaining that, "[a]lthough qualified immunity normally turns on objective circumstances, . . . this likely means objective circumstances actually known to the officer" (internal citations omitted)). The court "draw[s] on its judicial experience and common sense" to determine whether Plaintiffs have plausibly alleged that it would have been clear to a reasonable officer in the position of Rodriguez and Ruecker that his conduct was unlawful. *See Iqbal*, 129 S. Ct. at 1950 (internal citation omitted).

Plaintiffs have not shown that it would have been clear to a reasonable officer in Rodriguez and Ruecker's situation that his conduct of moving the anti-Bush demonstrators at the instruction of the Secret Service agents was unlawful. First, the facts alleged do not plausibly suggest that either Rodriguez or Ruecker would have been aware of the differential treatment of the anti-Bush demonstrators as compared to the pro-Bush demonstrators. Respondent does not allege, much less plausibly allege, that either Rodriguez or Ruecker were on location at the time of the alleged

injurious activity or knew of and were updated about the details of the relative sizes and locations of the demonstrators, diners, the President, and the nearby alleys, or of the relative distances between relevant street blocks, between the President's planned departure route and the various groups, etc. Yet, without factual allegations that plausibly suggest that Rodriguez and Ruecker knew of the differential treatment of the pro- and anti-Bush demonstrators, it is not plausible that it would have been clear to a reasonable officer in Rodriguez or Ruecker's position that his conduct was unconstitutional. The court agrees with Police Defendants on this point. (*See* State Defs.' Mem. in Supp. 17 ("[P]laintiffs do not allege any facts to show that either Superintendent Ruecker or Captain Rodriguez would have been aware of [the] differential treatment, such that they might have known that plaintiffs were subjected to viewpoint (or any) discrimination.").)

Second, even if Rodriguez and Ruecker had been aware of the differential treatment of the pro- and anti-Bush demonstrators, Plaintiffs have not shown that a reasonable police officer could find no legal justification for such differential treatment. *Bilida*, 211 F.3d at 174–175 ("Plausible instructions from a superior or fellow officer support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists (e.g. a warrant, probable cause, exigent circumstances)."); *accord Anderson*, 483 U.S. at 641, 107 S. Ct. 3034.

In *Bilida v. McCleod*, the court concluded that plaintiff "might well have a valid Fourth Amendment claim" where defendant police officers entered plaintiff's home and seized her pet raccoon without a warrant. 211 F.3d 166, 174 (1st Cir. 2000). However, the *Bilida* court also concluded that police officers were entitled to qualified immunity because they "had every reason to think that Captain Tyler had secured a warrant or concluded . . . that one was unnecessary" before he directed the defendants to seize the specific raccoon at the specific address. Captain Tyler was defendants' superior officer, and the defendants knew that "the decision [to seize the racoon] had already been made" following a investigation by the police and animal control that same evening. *Id.*

Here, even if a reasonable officer in the position of Rodriguez or Ruecker were fully aware of the details, he would have good reason to believe that his actions in compliance with the Secret Services' orders were legally justified. A reasonable officer could conclude that the Secret Service agents were acting and giving him directions based on knowledge of a specific threat to the President's safety known only to the Secret Service agents. Plaintiffs allege that Secret Service Defendants "requested or directed . . . Police Defendants to clear California Street *of all persons* between Third and Fourth Streets," not to clear California Street of all pro-Bush demonstrators between Third and Fourth Streets. (SAC ¶¶ 53–54 (emphasis added).) Furthermore, "the Defendant Secret Service agents told . . . the Police Defendants that the reason for the request or direction was that they

did not want anyone within handgun or explosive range of the President." (SAC ¶ 54.) Consequently, the Secret Service's instructions to the State Police Defendants would have been plausible instructions from a superior officer that, when viewed objectively, "could lead a reasonable officer to conclude that the necessary legal justification for his actions exists." *Bilida*, 211 F.3d at 174–175.

Third, Plaintiffs do not allege that Rodriguez or Ruecker knew enough about the policy and practice of the Secret Service to discern its alleged actual discriminatory policy from its alleged official policy. Plaintiffs make no allegations to support any allegation that State Defendants had sufficient knowledge to recognize that the Secret Service's activities, alleged to demonstrate the Secret Service's "Long History and Actual Policy" of discriminating against First Amendment expression (*see* SAC ¶¶ 63–72, 81–84), significantly differed from the "normal, lawful Secret Service security measures during Presidential public appearances or visits . . . absent . . . special circumstances suggesting the need for unusual security measures." (*see* SAC ¶ 78.) Consequently, it is not plausible that it would have been clear to a reasonable officer in the place of Rodriguez and Ruecker that his conduct was unlawful where he was following the Secret Service's orders to move all persons though these persons consisted predominantly of anti-Bush demonstrators.

Rodriguez and Ruecker are entitled to qualified immunity. Plaintiffs have not shown that either vio-

lated Plaintiffs' First Amendment rights, a requirement under the first prong of *Saucier*. Moreover, they fail to overcome the second prong of qualified immunity. Plaintiffs have not shown that a reasonable officer would have known of the Secret Service agents' differential treatment of the pro- and anti-Bush demonstrators, would have second-guessed the Secret Service's directions and their provided justification, or would have known enough about the Secret Service's policies to alert him to a First Amendment violation here. Consequently, the contours of Plaintiffs' rights would not have been sufficiently clear to alert a reasonable police officer in Rodriguez or Ruecker's position that his conduct was unlawful. Therefore, State Defendants' motion to dismiss Plaintiffs' claim against Rodriguez or Ruecker in their individual capacities should be granted. *See Anderson*, 483 U.S. at 640, 107 S. Ct. 3034.

C. City of Jacksonville Defendants' Motion to Dismiss the § 1983 First Amendment Claim Is Granted

City Defendants David Towe and City of Jacksonville move for summary judgment on Plaintiffs' § 1983 claim for violation of First Amendment rights and they also move to dismiss these claims for similar or the same reasons.

Plaintiffs pled similar if not identical claims in their FAC, and City Defendants moved for summary judgment in 2007. On April 22, 2007, the court held the motion for summary judgment in abeyance pending the completion of discovery at the request of Plaintiffs'

counsel. (Dkt. No. 103.) The court also stayed the discovery deadline on August 15, 2007. (Dkt. No. 129.)

Because discovery has not yet been completed, the court will not consider City Defendant's motion for summary judgment at this time.[12] However, the court reviews City Defendants' arguments as they relate to a motion to dismiss under Rule 12(b)(6).

As with Plaintiffs' claims against State Defendants, the complaint must plausibly plead that Defendant Towe acted under the color of state law and caused them to be deprived of their First Amendment rights. Plaintiffs allege they were deprived of their rights because of content or viewpoint discrimination. Accordingly, to survive the motion to dismiss, Plaintiffs must plausibly plead that Towe acted with discriminatory purpose during the challenged conduct. *See* Part V.B.I.

The City of Jacksonville may be held liable under § 1983 under current case law by what is known as a *Monell* claim. In *Monell v. Department of Social Services of the City of New York*, the Supreme Court explained,

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[12] When the Federal Defendants sought to appeal this court's denial of their motion for summary judgment, the Ninth Circuit first explained that it did not have jurisdiction over the issue but also commented that were the appeal to succeed were to succeed, it "would deny Plaintiffs a fair opportunity to litigate the merits of their claim." *Moss*, 572 F.3d at 972.

> a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsibly.

436 U.S. 658, 694–95, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). To survive the motion to dismiss as to § 1983 claims against the City of Jacksonville, then, Plaintiffs must plausibly allege that their First Amendment rights were violated by way of an official policy, custom or practice of the City of Jacksonville.

Plaintiffs make allegations against the City Defendants that are generally similar to the allegations against the State Defendants. They allege,

> Defendants' Towe, Rodriguez, Wingers and the other individual State and Local Police Defendants personally directed and approved of the actions of the police against [Plaintiffs], and personally directed and approved of permitting the pro-Bush demonstrators and unscreened diners, guests and visitors, . . . inside the Jacksonville Inn to remain in the vicinity undisturbed and unrestricted. The Police Defendants' actions . . . in using overwhelming and excessive force, including the use of officers in riot gear, against unarmed, law-abiding peaceful demonstrators exercising their core First Amendment rights of speech and assembly were the custom, policy, or practice of the State of Oregon and Defendants City of Jacksonville and

> Jackson County and Municipal Does . . . or were established as such by the individual Police Defendants in taking those actions. The individual Police Defendants had the final decision-making authority and responsibility for establishing the policies of their respective employers. The individual Police Defendants' decisions to order and implement the aforesaid police actions constituted the official policy of their respective public employers.

(SAC ¶¶ 96–97). Further they allege the discriminatory actions were the result of

> inadequate and improper training, supervision, instruction and discipline . . . of the police officers under the personal directions of State and Local Police Defendants. Such inadequate and improper training, supervision, instruction and discipline are the custom and practice of Defendants. By the practice or custom of failing to adequately and properly train, supervise, instruct or discipline their police officers, the Defendants have directly caused the violations of rights that are the subject of this action.

(SAC ¶ 99.)

For the same reasons as set forth above, these allegations as they refer to claims for First Amendment violations are no more than conclusory allegations and thus are not considered in the evaluation of the plausibility of Plaintiffs' claims. Allegations that Defendant Towe personally directed and approved of moving the anti-Bush demonstrators and leaving other groups

undisturbed are not supported by other factual allegations and amount to formulaic recitations of claim. Any remaining non-conclusory allegations do not plausibly allege that Defendant Towe acted with discriminatory intent. Plaintiffs merely allege that local police officers reasonably followed the Secret Service's request or direction to move the anti-Bush demonstrators. They have not plausibility alleged discriminatory intent.

Similarly, allegations that it was the custom and practice of the City of Jacksonville that also violated the Plaintiffs' First Amendment rights are also conclusory. Plaintiffs assert that the actions represent the custom and practice of the City of Jacksonville. However, their allegations only display that the custom or practice was to follow the directions of Secret Service officers who were tasked with providing security for the President. Plaintiffs have not alleged that the custom or practice was discriminatory or revealed any discriminatory intent. Plaintiffs have not alleged that any of the City's policies were adopted for a discriminatory purpose, thereby violating Plaintiffs' First Amendment rights. *See Iqbal*, 129 S. Ct. at 1948–49. There is no Monell claim against the City of Jacksonville.

Plaintiffs cannot overcome the City of Jacksonville Defendants' qualified immunity defense for the same reasons that they did not overcome the State Defendants' qualified immunity defense. *See* Part V.B.2. They have not met the first prong to show a violation of constitution rights, and neither can they meet the

second prong. Their allegations do not plead facts that their First Amendment rights were sufficiently clear in this circumstance that a reasonable officer following the directions of the Secret Service would know he was violating Plaintiffs' rights. In the context here, in which the President's safety is of imminent concern, it was not unreasonable for an officer to conclude that moving the group of anti-Bush demonstrators' would violate those demonstrators First Amendment rights.

Plaintiffs have not alleged a plausible § 1983 claim for violation of First Amendment rights against City Defendants. The City Defendants' motion should be granted.

VI. Fourth Amendment Claims

Plaintiffs allege Defendants violated their Fourth Amendment rights in the way in which they relocated anti-Bush demonstrators. They seek relief under *Bivens* against the Federal Defendants and relief under § 1983 against State, County and City Defendants. The 2007 R & R dismissed Plaintiffs' Fourth Amendment *Bivens* claim because "there were no allegations in the complaint supporting that defendants Savage or Wood directed local law enforcement to use excessive force on the demonstrators or unlawfully seize the demonstrators." (2007 R & R 44.) This decision is unchanged.

To determine whether Plaintiffs have stated a plausible Fourth Amendment claim under § 1983, the court follows the framework outlined by the Supreme Court in *Graham v. Connor. Davis v. City of Las Vegas,*

478 F.3d 1048, 1053–54 (9th Cir. 2007). "[A]ll claims that law enforcement officials have used excessive force—deadly or not—in the course of an arrest, investigatory stop or other 'seizure' . . . are properly analyzed under the Fourth Amendment and its 'objective reasonableness' standard." *Graham*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). "This analysis 'requires balancing the nature and quality of the intrusion' on the person's liberty with the 'countervailing governmental interests at stake' to determine whether the force used was objectively reasonable under the circumstances." *Davis*, 478 F.3d at 1054 (citing *Smith v. City of Hemet*, 394 F.3d 689, 701 (9th Cir. 2005)).

The court looks to reasonableness at the moment the excessive force occurred. "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates the Fourth Amendment. The calculus of reasonableness must embody the allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Graham*, 490 U.S. at 396-97, 109 S. Ct. 1865 (internal citations omitted).

The court first assesses the quantum of force used and then measures the governmental interest at stake by evaluating a range of factors. *Davis*, 478 F.3d at 1054. Factors include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the

suspect is actively resisting arrest or attempting to evade arrest by flight. *Id.* Courts also may consider whether there were other available alternative methods in capturing or subduing the individual. *Id.*

Plaintiffs' allegations of Fourth Amendment violations incorporate State, County, and City Defendants. Plaintiffs explicitly designated the term "Police Defendants" to refer collectively to (1) State Police Defendants Ruecker, McLain, Martz, and Rodriguez and (2) Local Police Defendants of the City of Jacksonville, Jackson County, individual defendants Towe and Winters, John Does 2-20, and the Municipal Doe Defendants.[13] (SAC ¶¶ 29-30.)

State Police Defendants move to dismiss the claim against them for failure to state a claim. The City of Jacksonville Defendants move for summary judgment

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[13] Section 1983 provides a civil action against persons who violate an individual's constitutional rights. Federal employees sued in their individual capacities may be sued for damages as well as declaratory or injunctive relief. *Hafer v. Melo*, 502 U.S. 21, 31, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). Individuals sued in their official capacities may only be sued for declaratory or injunctive relief. *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908). Further, a state is not a person for the purposes of this section, but case law, however, treats municipal and local governments as "persons" under the statute and subject to damages and declaratory or injunctive relief. *Monell v. Dept. of Social Services of New York*, 436 U.S. 658, 701, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Because all injunctive relief claims were dismissed in the 2007 R & R, Plaintiffs' remaining Fourth Amendment claims under § 1983 are for damages against Defendants Rodriguez, Ruecker, Towe, Winters, Jackson County, and the City of Jacksonville.

on Plaintiffs' Fourth Amendment claims. As previously noted, the court holds the summary judgment motion in abeyance pending the close of discovery. It does consider the City of Jacksonville Defendants' motion under the Rule 12(b)(6) standards.

A. State Police Defendants' Motion to Dismiss the § 1983 Fourth Amendment Claim Is Denied

State Police Defendants argue that Plaintiffs' claim for Fourth Amendment violations should be dismissed because the SAC does not allege personal conduct of Defendants Ruecker and Rodriguez to meet the pleading requirements for a § 1983 claim under Rule 8 and there is no liability because they have qualified immunity. Plaintiffs have plausibly pled a § 1983 Fourth Amendment claim.

The court analyzes State Defendants' motions under the *Iqbal* standard explained above. Plaintiffs must state a claim that is plausible on its face. A § 1983 claim must allege personal conduct of the named defendants in order to allege liability. (See V.B, *supra*.) While supervisory liability is inapplicable, Plaintiffs may allege Ruecker and Rodriguez are liable for the actions of their subordinates if they plausibly allege one the bases for liability set forth in *al-Kidd*, 580 F.3d at 965 (imposing liability for actions of subordinates "(1) for setting in motion a series of acts by others . . . which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by sub-

ordinates; [and] (4) for conduct that shows a 'reckless or callous indifference to the rights of others'") (internal citations and quotations omitted).

State Defendants move to dismiss, asserting that personal conduct allegations are "virtually nonexistent" and they have qualified immunity. (State Defs.' Mem. in Supp. 20.) The court disagrees. When assuming the non-conclusory factual allegations as true for the purposes of this motion to dismiss, there are sufficient allegations to state a plausible claim.

Plaintiffs allege that State Defendants used unreasonable force in relocating anti-Bush demonstrators who were demonstrating peacefully, lawfully and exercising their protected First Amendment rights. (SAC ¶¶ 45, 59-62.) Their allegations provide context for the events that day and allege that the anti-Bush demonstrators made efforts to cooperate with law enforcement officers and sought to plan and participate in a lawful demonstration.

> Plaintiff Elkovich told Defendants that parents and their young children were expected to participate, that she wanted to avoid any possible problems, and that the demonstration was to be peaceful and law-abiding, with handouts to participants so informing them. Plaintiff Elkovich also emphasized that due to the law-abiding nature of the gathering, riot-geared police would not be necessary and asked that they not be present. Defendant Towe assented to the route and location of the demonstration and said he did not plan to use riot-geared police.

(SAC ¶ 39.)

Plaintiffs allege, however, that when the State Defendants were instructed to relocate the anti-Bush demonstrators, all Defendants went too far.

> Police Defendants and their police officers, including officers clad in riot gear, forced the anti-Bush demonstrators to move east along California Street, in some cases by violently shoving Plaintiffs . . . and striking them with clubs and firing pepper spray bullets at them. . . . After moving [anti-Bush demonstrators] across Fifth Street, the Police Defendants divided [anti-Bush demonstrators] into two groups, encircling each group and preventing [anti-Bush demonstrators] from leaving the area. Some . . . including those with young children, were attempting to leave the area. Several families had become separated, including children; some of whom were lost, frightened and traumatized as a result of the Police Defendants' actions.

(SAC ¶¶ 60–61.)

Further, Plaintiffs allege,

> The Police Defendants' actions and the actions of the police officers in using overwhelming and excessive force, including the use of officers clad in riot gear, against unarmed, law-abiding peaceful demonstrators exercising their core First Amendment rights . . . were the custom, policy or practice of the State of Oregon and Defendants City of Jacksonville and Jackson County and Municipal

> does respectively, or were established as such by the individual Police Defendants in taking those actions. The individual Police Defendants had the final decisionmaking authority and responsibility for establishing the policies of their respective employers. The individual Police Defendants' decisions to order and implement the aforesaid police actions constituted the official policy of their respective public employers. . . . The Defendants' actions against Plaintiffs . . . in the use of overwhelming and constitutionally excessive force against them were the result of inadequate and improper training, supervision, instruction and discipline . . . of the police officers under the personal directions of the State and Local Police Defendants. Such inadequate and improper training, supervision, instruction and discipline are the custom and practice of the Defendants. By the practice or custom of failing to adequately and properly train, supervise, instruct or discipline their police officers, the Defendants have directly caused the violations of rights that are the subject of this action.

(SAC ¶¶ 97–99.)

Taking these non-conclusory factual allegations as true, Plaintiffs have plausibly alleged that their Fourth Amendment rights were violated. Assessing the quantum of force and measuring the government interest at stake here, Plaintiffs have alleged that the use of force, namely use of violent shoving, strikes with clubs, and use of pepper spray, was unreasonable.

Undoubtedly, the government interest is high in this case; few would argue that the safety and security of the President should not be of great concern. However, given the specific circumstances here—a peaceful, planned, multi-generation demonstration—Plaintiffs have plausibly alleged the force used to relocate the group went too far.

For instance, Plaintiffs' factual allegations show that the anti-Bush demonstrators did not pose a greater risk to the security of the President as other individuals in the area or to the officers. *See Davis*, 478 F.3d at 1054. In addition, the factual allegations suggest that other methods could have been employed to relocate the group. *See id.* Plaintiffs assert that Police Defendants did not communicate with the demonstration organizers about the need to move the location and Plaintiffs assert that the Police Defendants began moving the demonstrators "[w]ithout attempting to determine whether the assemblage understood the announcements, and without allowing time for the class of about 200 to 300 persons crowded on the sidewalks to move." (SAC ¶ 60.) Considering these allegations under the framework of *Davis* and *Graham* and accepting the factual allegations as true for the purpose of this motion, the court finds the use of force was not reasonable.

State Defendants argue there is no § 1983 claim because Plaintiffs have not alleged personal conduct and are seeking liability through supervisor liability: "it appears to be plaintiffs' view that Rodriguez and Ruecker are liable because they were responsible for

the conduct of those they supervised, and not because of any injury or other constitutional deprivation that they personally rendered." (State Defs.' Mem. in Supp. 18.)

The court disagrees. Plaintiffs have alleged sufficient personal conduct to state a claim against the State Police Defendants. As set forth in *al-Kidd*, an official may be held liable for culpable action or inaction in training, supervision, or control of subordinates. 580 F.3d at 965. Plaintiffs have alleged that actions taken against the anti-Bush demonstrators were "overwhelming and constitutionally excessive force" and that they were a "result of inadequate and improper training, supervision, instruction and discipline." It is plausible on the face of the complaint that officers who use excessive force in the circumstances described here have had inadequate training as to what is necessary and appropriate force to relocate peaceful demonstrators.

Allegations also support that State Police Defendants may be held liable for setting into motion a series of acts that they knew or should have known would result in the use of excessive force. *See id.* Plaintiffs assert that the officers employing the alleged excessive force were under the personal direction of the State Police Defendants. It goes without saying that officers will be taking directions and orders from their superiors. Such directions, including that officers use riot gear on a peaceful group of demonstrators, could plausibly set into motion the course of events that resulted in the injury here. While it may give

further support to their claim to have allegations as to training manuals or verbatim instructions, at this stage in the litigation, it is not necessary.

Plaintiffs have plausibly alleged that State Defendants used excessive force to move a group of peaceful demonstrators. Plaintiffs have asserted that officers who forcibly relocated the group were under the direction of the State Defendants. They have plausibly alleged personal conduct of State Police Defendants to be held liable under § 1983.

1. State Defendants Do Not Have Qualified Immunity

State Defendants assert qualified immunity, and they argue that Plaintiffs cannot meet the second prong: "Even under the 'peaceful' circumstances alleged by plaintiffs, these officers reasonably could have believed that the degree of force used was appropriate in carrying out their duties." (State Defs.' Mem. in Supp. 26.) The court disagrees.

Following the steps from *Saucier* outlined in preceding sections, Plaintiffs have met the first prong of the qualified immunity inquiry by plausibly alleging State Defendants' personal conduct violated their Fourth Amendment rights. For the claim to survive, they must further allege that their right to be free of excessive force was sufficiently clear such that a reasonable officer would know that his conduct violates their rights. *See Saucier*, 533 U.S. at 202, 121 S. Ct. 2151.

The court in *Saucier* discussed the definition of "reasonableness" in the second prong of the quality immunity inquiry. "The concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. . . . An officer might correctly perceive all the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances." *Id.* at 205, 121 S. Ct. 2151. In *Saucier*, the demonstrator alleged that a police officer used excessive force when he grabbed plaintiff, took him to a military van, and pushed or shoved him inside. At the time this occurred, the demonstrator was attempting to hang a banner at a national park where the Vice President of the United States was in attendance. He had hidden the banner from view knowing that it was not permitted and was attempting to display the banner on a barrier that separated the public from a secure area when he was intercepted by police. *Id.* at 206, 121 S. Ct. 2151.

The court concluded, based on the specific circumstances, that the police officer's actions were "within the bounds of appropriate police responses."

> [Police officer] did not know the full extent of the threat [the demonstrator] posed or how many other persons there might be who, in concert with [the demonstrator] posed a threat to the security of the Vice President. There were other potential protestors in the crowd, and at least one other individual was arrested and placed into the van. . . . It cannot be said there was a clearly established

> rule that would prohibit using the force [police officer] did to place [the demonstrator] into the van to accomplish these objectives.

Id. at 208–09, 121 S. Ct. 2151.

The circumstances here are simply not the same. Here, Plaintiffs communicated with Police Defendants prior to the demonstration, seeking to inform them of their plans and confirm that the demonstration would be lawful. Plaintiffs identified themselves as demonstrators, notified Police Defendants of their size and intent, and obtained approval for the time, place, and route of their demonstration. (SAC ¶ 39.) Plaintiffs took no affirmative action to threaten the security of the President. The threat they posed was based on their proximity to the President and not on some questionable, potentially threatening action of deliberately approaching a security barrier. (SAC ¶ 54.) Their peaceful demonstration, however was met by police officers who were "forcefully [moving anti-Bush demonstrators] from where they were demonstrating, using clubs, pepper spray bullets, and forceful shoving." (SAC ¶ 61.) After the relocation to Fifth Street, the group was divided and encircled, preventing some from leaving and separating family members, including small children. (SAC ¶ 61.) As alleged and for the purposes of this motion, the circumstances support Plaintiffs and their assertion that a reasonable officer would know such force on this group was unreasonable.

Plaintiffs' have alleged a plausible § 1983 claim for violation of the Fourth Amendment rights against

State Police Defendants, and these defendants are not entitled to qualified immunity.

B. City Defendants' Motion to Dismiss the § 1983 Fourth Amendment Claim Is Denied

Allegations of City Defendants' actions that violated Plaintiffs' Fourth Amendment rights are nearly identical to allegations of the State Defendant actions. (SAC ¶¶ 96–99.) Plaintiffs seek relief from Defendant Towe under § 1983 for actions taken in his individual capacity. For the same reasons that State Defendants Ruecker and Rodriguez may be held liable for Fourth Amendment violations in their individual capacities, so may Defendant Towe. Allegations support that Defendant Towe may be held liable for setting into motion a series of acts that they knew or should have known would result in the use of excessive force.

Plaintiffs also seek relief from the Defendant City of Jacksonville under § 1983. As previously explained, a municipality may be held liable under § 1983 if the custom and practice or official policy is alleged to have violated constitutional rights. *Monell*, 436 U.S. at 694–95, 98 S. Ct. 2018; see Part V.C. Liability results when such custom or policy "may fairly be said to represent official policy." *Id.*

Plaintiffs have not plausibly stated a *Monell* claim. Though they cite the elements of such a claim in their complaint, allegations are no more than a formulaic recitation and are not entitled to the presumption of truth, under *Iqbal*, 129 S. Ct. at 1951. Barely stating that "the individual Police Defendants' decisions to

order and implement the aforesaid police actions constituted the official policy of their respective public employers" is simply not enough. Section 1983 claims against City of Jacksonville, therefore, should be dismissed.

VII. Claims for Violation of Oregon Constitution

Plaintiffs' third claim seeks relief from County and City Defendants for violations of rights under the Oregon Constitution. (SAC ¶¶ 112-115.) The court's 2007 R & R dismissed this claim. (2007 R & R 2.) Relying on the Oregon Supreme Court decision *Hunter v. City of Eugene*, 309 Or. 298, 787 P.2d 881 (1990), the court explained that "persons whose rights under Article I, Section 8 of the Oregon Constitution are violated may not bring an action for damages directly under the constitution, but are limited to existing common law, equitable and statutory remedies." (2007 R & R 36.) The court's previous decision is unchanged, and Plaintiffs' third claim for relief is dismissed.

VIII. Claims for Oregon Common Law Violations

Plaintiffs' fourth claim seeks relief from City and County defendants for violation of Oregon common law for assault, battery, false imprisonment, and negligence. (SAC ¶¶ 116–18.) City Defendants move for summary judgment on this claim.

Plaintiffs pled similar if not identical claims in their FAC, and City Defendants moved for summary judgment in 2007. On April 22, 2007, the court held the motion for summary judgment in abeyance pending

the completion of discovery at the request of Plaintiffs' counsel. (Dkt. No. 103.) The court also stayed the discovery deadline on August 15, 2007. (Dkt. No. 129.)

Plaintiffs' claims for Oregon common law violations are fact-intensive, and entering judgment on these claims without providing the opportunity to complete discovery would be premature and unfair to both parties. The court holds City Defendants' current motion for summary judgment in abeyance, as to claims remaining claims.

IX. Conclusion

Consistent with the 2007 R & R, all prospective and injunctive relief claims, all Fifth and Fourteenth Amendment claims, claims against Defendant Basham, *Bivens* claim against Federal Defendants for Fourth Amendment violations, and all claims for violation of the Oregon Constitution are dismissed.

Defendants' motions are granted in part, dismissing the following claims:

Against State Defendants: § 1983 claim for violation of Plaintiffs' First Amendment rights against defendant Ruecker and Rodriguez in their individual capacities.

Against City of Jacksonville Defendants: § 1983 claim for violation of Plaintiffs' First Amendment rights against Defendant Towe in his individual capacity and the City of Jacksonville and § 1983 claim for violation of Plaintiffs' Fourth Amendment Rights against City of Jacksonville.

Thus, remaining claims include:

Against Federal Defendants: *Bivens* claim for violation of Plaintiffs' First Amendment rights against defendants Wood and Savage in their individual capacities.

Against State Defendants: § 1983 claims for violation of Plaintiffs' Fourth Amendment rights against defendant Ruecker and Rodriguez in their individual capacities.

Against County Defendants: § 1983 claims for violation of Plaintiffs' First and Fourth Amendment rights and claims for relief under Oregon common law.

Against City Defendants: § 1983 claim for violation of Plaintiffs' Fourth Amendment rights against Defendant Towe in his individual capacity and claims for relief under Oregon common law against Defendant Towe and the City of Jacksonville.

X. Recommendation

The motions should be granted in part and denied in part.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. *Objections to this Report and Recommendation, if any, are due by* ***August 23, 2010****. If objections are filed, any responses to the objections are due within 17 days, see Federal Rules of Civil*

Procedure 72 and 6. Failure to timely file objections to any factual determinations of the Magistrate Judge will be considered a waiver of a party's right to de novo consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to the Magistrate Judge's recommendation.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 06-3045-CL

MICHAEL MOSS, LESLEY ADAMS, BETH WILCOX, RICHARD ROYER, LEE FRANCES TORELLE, MISCHELLE ELKOVICH AND ANNA VINE, FORMERLY KNOWN AS ANNA BOYD, INDIVIDUALLY AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, AND JACKSON COUNTY PACIFIC GREEN PARTY, PLAINTIFFS

v.

UNITED STATES SECRET SERVICE OF THE DEPARTMENT OF HOMELAND SECURITY, MARK SULLIVAN, DIRECTOR OF THE UNITED STATES SECRET SERVICE, IN HIS OFFICIAL CAPACITY, RALPH BASHAM, FORMER DIRECTOR OF THE UNITED STATES SECRET SERVICE, IN HIS INDIVIDUAL CAPACITY, TIM WOOD, UNITED STATES SECRET SERVICE AGENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, ROB SAVAGE, UNITED STATES SECRET SERVICE AGENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, JOHN DOE 1, UNITED STATES SECRET SERVICE AGENT, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, PARTICIPATING IN THESE ACTIONS AND KNOWN TO THE DEFENDANT SECRET SERVICE, BUT UNKNOWN AT THIS TIME TO PLAINTIFFS, DAVID TOWE, CHIEF OF POLICE OF JACKSONVILLE, OREGON, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, CITY OF JACKSONVILLE, A MUNICIPAL CORPORATION OF THE STATE OF OREGON, RON RUECKER, SUPERINTENDENT OF THE OREGON STATE POLICE, IN HIS INDIVIDUAL CAPACITY, TIMOTHY F. MCLAIN, SUPERINTENDENT OF THE OREGON STATE POLICE, IN HIS OFFICIAL CAPACITY, RANDIE MARTZ, CAPTAIN OF

THE SOUTHWEST REGIONAL HEADQUARTERS OF THE OREGON STATE POLICE, IN HIS OFFICIAL CAPACITY, ERIC RODRIGUEZ, FORMER CAPTAIN OF THE SOUTHWEST REGIONAL HEADQUARTERS OF THE OREGON STATE POLICE, IN HIS INDIVIDUAL CAPACITY, MIKE WINTERS, SHERIFF OF JACKSON COUNTY, IN HIS OFFICIAL AND INDIVIDUAL CAPACITIES, JACKSON COUNTY, A MUNICIPAL CORPORATION OF THE STATE OF OREGON, JOHN DOES 2-20, THAT IS, THE COMMANDING OFFICERS OF OTHER LAW ENFORCEMENT AGENCIES OF PUBLIC BODIES PARTICIPATING IN THESE ACTIONS, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, KNOWN TO THE IDENTIFIED DEFENDANTS, BUT UNKNOWN AT THIS TIME TO PLAINTIFFS, AND MUNICIPAL DOES, THE PUBLIC BODIES EMPLOYING DEFENDANTS JOHN DOES 2-20, DEFENDANTS

[Filed: Oct. 16, 2009]

SECOND AMENDED COMPLAINT
Filed by Plaintiffs

DEMAND FOR JURY TRIAL

INTRODUCTION

1. This is a class action, pursuant to the First, Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, 5 U.S.C. § 702, the Oregon Constitution, Article I, Sections 8, 9, 20 and 26, and the common law, seeking damages and injunctive and declaratory relief against the Defendants for unconstitutional, unlawful, and tortious ac-

tions against Plaintiffs and Plaintiff Class, growing out of and related to Defendants' disrupting a lawful assembly and protest demonstration by Plaintiffs and Plaintiff Class in Jacksonville, Oregon on October 14, 2004. Although certain of Plaintiffs' claims were dismissed by the court on Defendants' Motions, those claims are restated here so as to preserve them for appeal.

2. The individual Plaintiffs are citizens of the United States and residents of Oregon who were in Jacksonville, Oregon, on October 14, 2004, assembled on the public sidewalks in front of and across the street from an inn where President George W. Bush was present, and conducting a demonstration ("the demonstration") to protest the President's policies. Plaintiff Jackson County Pacific Green Party ("Green Party") joins this action on behalf of its members, some of whom were participants in the demonstration. Plaintiffs were exercising their First Amendment rights by demonstrating peacefully and in full accordance with the law when, without provocation or lawful basis, and without reasonable or adequate warning, the Defendants, by physical force, compelled Plaintiffs to vacate the sidewalks which by right they had chosen for their demonstration. The Defendants, in addition to unlawfully and forcefully moving Plaintiffs, failed to give them an adequate warning and opportunity to move of their own volition. Some Defendants physically assaulted members of Plaintiff Class by pushing them, striking them with clubs and firing pepper spray bullets into the assemblage. The individual named Plaintiffs, each of whom was protesting in Jacksonville

and each of whose constitutional rights were violated by the Defendants, accordingly bring this action under the United States Constitution, 42 U.S.C. § 1983, the Oregon Constitution and the common law to vindicate their own civil rights and the civil rights of Plaintiff Class.

3. Plaintiffs seek declaratory and injunctive relief prohibiting the United States Secret Service and Defendants Sullivan, Basham, Wood, Savage and John Doe 1 ("Secret Service Defendants"), Defendants McLain, Martz, and Rodriguez ("State Police Defendants"), the other Defendants ("Local Police Defendants"), and all persons acting as their agents or in concert with them, from engaging in the practice of or continuing a pattern and practice of, or requesting or encouraging others to engage in the practice of:

(a) Barring or forcing a lawful assembly of people from any area where they have a lawful right to assemble, where there is no reasonable security reason to so bar or force them;

(b) Barring or forcing a lawful assembly of people from areas where other unscreened members of the public are allowed to congregate or be present;

(c) Barring or forcing anti-government demonstrators from areas where pro-government demonstrators are allowed to be present;

(d) Using excessive force to move nonviolent persons;

(e) Using riot-geared officers at nonviolent demonstrations; and

(f) Using non-lethal weapons or any form of chemical agents against nonviolent demonstrators.

4. Plaintiffs also seek an award of compensatory and punitive damages for violation of their constitutional rights, as well as for physical injuries, pain and suffering, against the individual Secret Service Defendants, except Defendant Sullivan, in their individual capacities; the individual Local Police Defendants, including the individual John Doe Defendants, in their individual capacities; and against Defendants Jackson County, the City of Jacksonville and the Municipal Does.

JURISDICTION

5. This action is brought pursuant to the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution, *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), 5 U.S.C. § 702 and 42 U.S.C. § 1983. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

6. This Court has supplemental jurisdiction over Plaintiffs' state law claims under 28 U.S.C. § 1367.

PARTIES

Plaintiffs

7. At all times material hereto, Plaintiff Michael Moss ("Plaintiff Moss") was a resident of Jacksonville, Oregon, participating in the demonstration. Plaintiff Moss was struck with clubs and shot with pepper spray bullets by police officers employed by or under the supervision or control of the State and Local Police Defendants.

8. At all times material hereto, Plaintiff Lesley Adams ("Plaintiff Adams") was a resident of Jacksonville, Oregon, participating in the demonstration.

9. At all times material hereto, Plaintiff Beth Wilcox ("Plaintiff Wilcox") was a resident of Shady Cove, Oregon, participating in the demonstration.

10. At all times material hereto, Plaintiff Richard Royer ("Plaintiff Royer") was a resident of Trail, Oregon, participating in the demonstration. Plaintiff Royer had a pre-existing asthma condition and was injured by the chemical agents in the bullets used by police officers employed by or acting as agents of the Police Defendants.

11. At all times material hereto, Plaintiff Lee Frances Torelle ("Plaintiff Torelle") was a resident of Ashland, Oregon, participating in the demonstration. At the time of the demonstration, Plaintiff Torelle was a minor. Plaintiff Torelle was separated from the adults who accompanied her to the demonstration and was injured by the chemical agents used by police

officers employed by or acting as agents of the Police Defendants.

12. At all times material hereto, Plaintiff Mischelle Elkovich ("Plaintiff Elkovich") was a resident of Ashland, Oregon, and was a co-organizer of and participated in the demonstration.

13. At all times material hereto, Plaintiff Anna Vine, formerly known as Anna Boyd ("Plaintiff Vine") was a resident of Ashland, Oregon, and was a co-organizer of and participated in the demonstration. Plaintiff Vine is allergic to pepper spray and was injured by the chemical agents in the bullets used by police officers employed by or acting as agents of the Police Defendants.

14. The Jackson County Pacific Green Party is an unincorporated association and a political party in Jackson County, Oregon, some of whose members participated in the demonstration, and whose members, at the encouragement of the Party, regularly engage in peaceful demonstrations in Jackson County, in other parts of Oregon; and around the country, including at public appearances by senior federal officials protected by the United States Secret Service Defendants.

Defendants

15. Defendant United States Secret Service of the Department of Homeland Security ("Defendant Secret Service") is and at all times material hereto was the federal agency responsible for providing security for

the President and Vice President of the United States and certain other senior federal officials.

16. Defendant Mark Sullivan ("Defendant Sullivan") is the Director of the United States Secret Service, acting within the scope of his employment and under color of law, and responsible for directing the operations of the Secret Service and supervising all Secret Service agents. He is sued in his official capacity only. Defendant Ralph Basham ("Defendant Basham") was the Director of the United States Secret Service on October 14, 2004, and prior to Defendant Sullivan taking office on May 30, 2006, acting within the scope of his employment and under color of law and responsible for directing the operations of the Secret Service and supervising all Secret Service agents. Defendant Basham is sued in his individual capacity only.

17. Defendants Tim Wood ("Defendant Wood"), Rob Savage ("Defendant Savage"), and John Doe I ("Defendant John Doe 1") at all times material hereto, were Secret Service agents at the scene of the demonstration, acting within the scope of their employment and under color of law, assigned to provide security for the President, and directing, requesting and communicating with the other Defendants in their operations related to the demonstration. Defendants Wood, Savage and Doe 1 are sued in their official and individual capacities.

18. Defendant David Towe ("Defendant Towe") is and at all times material hereto was, the Chief of the Jacksonville Police Department, acting within the

scope of his employment and under color of state law, and responsible for directing the operations of the Jacksonville Police Department and supervising the law enforcement officers and agents acting under his authority, as well as law enforcement officers of other agencies who were at the scene of the demonstration to assist and support Defendants Towe and the City of Jacksonville. Defendant Towe is sued in his official and individual capacities.

19. Defendant City of Jacksonville ("Defendant Jacksonville") is a duly organized municipal corporation under Oregon law, and a public body liable for the tortuous conduct of its agents and employees pursuant to ORS 30.260(4) and 30.265(1). Defendant Jacksonville employs Defendant Towe.

20. Defendant Ron Ruecker (hereafter "Defendant Ruecker") is and, until January 2007, was the Superintendent of the Oregon State Police, acting within the scope of his employment and under color of state law, and responsible for directing the operations of the Oregon State Police and supervising the law enforcement officers and agents acting under his authority. Defendant Ruecker is sued in his individual capacity.

21. Defendant Timothy F. McLain ("Defendant McLain"), as successor to Ron Ruecker, is currently the Superintendent of the Oregon State Police, having been appointed in January 2007, and is responsible for directing the operations of the Oregon State Police and supervising the law enforcement officers and agents acting under his authority. Defendant McLain is sued in his official capacity only.

22. Defendant Randie Martz ("Defendant Martz"), as successor to Kurt Barthel, is the Captain of the Southwest Regional Headquarters of the Oregon State Police, acting within the scope of his employment and under color of state law, and responsible for directing the operations of said headquarters and supervising the law enforcement officers and agents acting under his authority. Defendant Martz is sued in his official capacity only (as was his predecessor, Kurt Barthel).

23. On October 14, 2004, Defendant Eric Rodriguez ("Defendant Rodriguez") was Captain of the Southwest Regional Headquarters of the Oregon State Police acting within the scope of his employment and under color of state law, and responsible for directing the operations of said Headquarters and supervising the law enforcement officers and agents acting under his authority. Defendant Rodriguez is sued in his individual capacity only.

24. Defendant Mike Winters ("Defendant Winters") is and at all times material hereto was, the Sheriff of Jackson County, acting within the scope of his employment and under color of state law, and responsible for directing the operations of the Jackson County Sheriffs Office and supervising the law enforcement officers and agents acting under his authority. Defendant Winters is sued in his official and individual capacities.

25. Defendant Jackson County ("Defendant Jackson County") is a political subdivision of the state of Oregon and is a public body liable for the tortious conduct of its agents and employees pursuant to ORS

30.260(4) and 30.265(1). Defendant Jackson County employs Defendant Winters.

26. Defendants John Does 2-20 were the commanding officers of, and Defendant Municipal Does were the governmental bodies employing, other law enforcement agents participating in the actions of the identified Defendants taken against Plaintiffs during the demonstration, which Defendants' identities are known to the identified Defendants, but unknown at this time to Plaintiffs. At all relevant times Defendant John Does 2-20 were acting under color of state law and acting within the scope of their authority. Defendant John Does 2-20 are sued in their official and individual capacities.

27. The true names of all John Doe and Municipal Doe Defendants shall be substituted and this Complaint shall be amended when their identities are established during discovery.

28. At all times material hereto, the term "Secret Service Defendants" refers to the Defendant Secret Service, individual defendants Sullivan, Basham, Wood and Savage and John Doe 1.

29. The term "State Police Defendants" refers to Defendants Ruecker, McLain, Martz, and Rodriguez.

30. The term "Local Police Defendants" refers to the City of Jacksonville, Jackson County, individual Defendants Towe and Winters, John Does 2-20, and the Municipal Doe Defendants. The term "Police Defendants" refers collectively to the "State Police Defendants" and the "Local Police Defendants."

CLASS ALLEGATIONS

31. The Individual Plaintiffs bring this suit on behalf of themselves and as a class action pursuant to the provisions of Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure on behalf of the class of all persons, adults and children, assembled on, or denied access to assemble on, or forced to move away from, the sidewalks adjacent to and across the street from the Jacksonville Inn, between Third and Fourth Streets, in Jacksonville, Oregon, on the evening of October 14, 2004 ("Plaintiff Class").

32. On information and belief, Plaintiff Class includes approximately 200 to 300 persons, making joinder of all class members impracticable.

33. Questions of law and fact common to members of Plaintiff Class include:

(a) Whether the Defendants had a lawful basis to order the class to move away from the public sidewalks where they were assembled and exercising First Amendment rights;

(b) Whether the conduct of Plaintiff Class presented a clear and present danger that justified the taking of law enforcement action that interfered with Plaintiff Class's exercise of First Amendment rights;

(c) Whether Plaintiff Class as a whole was peaceful and orderly at the time that the Defendants physically assaulted Plaintiff Class members by pushing them, striking them with clubs, and firing pepper spray bullets into Plaintiff Class;

(d) Whether the Defendants' decision to move and to use force against Plaintiff Class and their action in doing so was based on the content of the speech of Plaintiff Class rather than security considerations;

(e) Whether the Police Defendants gave Plaintiff Class an adequately intelligible order to disperse and a reasonable opportunity to do so prior to taking physical action against Plaintiff Class;

(f) Whether the Defendants had a lawful basis to employ physical force against Plaintiff Class, including forceful shoving, firing pepper spray bullets into Plaintiff Class and striking demonstrators with clubs, and whether the Defendants' actions in doing so constituted excessive force;

(g) Whether there was unjustified firing of pepper spray bullets into Plaintiff Class and whether that constituted excessive force;

(h) Whether the Defendants lacked reasonable grounds to believe and lacked a good faith belief that Plaintiff Class had violated any laws or that Plaintiff Class was engaged in any conduct that justified ordering them to move, moving them, and moving them with physical force;

(i) Whether the Defendants' actions violated the First, Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution, the Oregon Constitution, Article I, Sections 8, 9, 20, and 26, and state common law rights of Plaintiff Class;

(j) Whether the Secret Service Defendants have engaged in a nationwide pattern and practice of

unconstitutionally creating excessively large security zones around Secret Service protectees that are not based on security criteria; and

(k) Whether the Secret Service Defendants have engaged in a nationwide pattern and practice of unconstitutionally excluding anti-government demonstrators from traditional public forums where pro-government demonstrators, and other unscreened members of the public, are allowed to congregate.

34. The named Plaintiffs' claims are typical of the claims of all members of Plaintiff Class. The interests of the named class representatives are not antagonistic to and are aligned with the interests of Plaintiff Class because each named Plaintiff's claim stems from the same events that founded the basis of the class claims and is based upon the same legal or remedial theory. The named Plaintiffs will fairly and adequately protect the interests of members of Plaintiff Class. Plaintiffs are represented by counsel competent to prosecute this civil rights class action.

35. Questions of law and fact common to the members of Plaintiff Class predominate over any questions affecting only individual members, including legal and factual issues relating to damages.

36. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Class treatment will be more efficient, convenient and desirable than individual litigation of numerous claims. Plaintiff Class is readily defined and is manageable, and prosecution of a class action will eliminate the possibility of repetitious litigation.

FACTS

The Demonstration at the Jacksonville Inn

37. On October 14, 2004, President George W. Bush made a campaign appearance in Central Point, Oregon. President Bush was scheduled to spend the evening at the Jacksonville Inn Honeymoon Cottage located on Main Street, west of Third Street, and south of California Street, approximately two blocks from the Jacksonville Inn, in Jacksonville, Oregon.

38. Plaintiffs Elkovich and Vine organized a demonstration to take place in Jacksonville, Oregon on the afternoon and evening of October 14, 2004. The demonstrators planned to gather during the afternoon in Griffin Park, located on South Fifth Street in Jacksonville, about two blocks from the Jacksonville Inn, then, beginning at about 5:30 PM, to march from Griffin Park to the sidewalks on California Street between 3rd and 4th Streets, a location about two blocks away from the Honeymoon Cottage in Jacksonville, Oregon, where the President was scheduled to spend the evening.

39. Prior to the demonstration, Plaintiff Elkovich spoke separately with Defendant Towe, Chief of the Jacksonville Police, and with Defendant Winters, Sheriff of Jackson County. Plaintiff Elkovich informed these Defendants of the details of the planned demonstration and the route the demonstrators planned to follow. Plaintiff Elkovich told these Defendants that parents and their young children were expected to participate, that she wanted to avoid any possible problems, and that the demonstration was to

be peaceful and law-abiding, with handouts to participants so informing them. Plaintiff Elkovich also emphasized that due to the law-abiding nature of the gathering, riot-geared police would not be necessary and asked that they not be present. Defendant Towe assented to the route and location of the demonstration and said he did not plan to use riot-geared police.

40. Plaintiff Elkovich asked Defendant Towe to be accessible to her for coordination purposes at the scene of the demonstration. Defendant Towe declined, and did not propose an alternative means for the police to maintain coordination with demonstration leaders during the demonstration.

41. Defendant Winters told Plaintiff Elkovich that protecting the rights of demonstrators was one of his priorities and that officers in riot gear would be in discreet locations, but not deployed unless needed. Defendant Winters assented to the route and location of the demonstration and assured Plaintiff Elkovich that if demonstrators stayed on the sidewalks, there would not be any problems. Defendant Winters did not propose any means for the police to maintain coordination with demonstration leaders during the demonstration.

42. Beginning about 5:00 PM on October 14, 2004, Plaintiffs and Plaintiff Class, consisting of about 200 to 300 anti-Bush demonstrators, including elderly people, families, children, and babes in arms, assembled in Griffin Park in Jacksonville, Oregon.

43. In Griffin Park, Plaintiff Vine told the assembled anti-Bush demonstrators of the demonstration

plan, that the plan had been discussed with Defendants Towe and Winters, that Defendants Towe and Winters had assured Plaintiff Elkovich that the demonstrators would not be disturbed if they remained on the sidewalks, and that there was to be no disorder.

44. The State and Local Police Defendants' police officers were located throughout downtown Jacksonville. At about 6:00 PM, the anti-Bush demonstrators, in accordance with the planned demonstration and the route which Plaintiff Elkovich had cleared with Defendants Towe and Winters, left Griffin Park and proceeded to California Street between Third and Fourth Streets.

45. At that time, Plaintiffs and Plaintiff Class did not know that the President would decide to come to the Jacksonville Inn on California Street for dinner. Plaintiffs and Plaintiff Class conducted their demonstration with chants, slogans, and signs. All class members were orderly, interacted with police without incident, and remained on the sidewalks.

46. Immediately adjacent to the anti-Bush demonstrators was a similarly sized group of pro-Bush demonstrators, also chanting and exhibiting signs. The pro-Bush demonstrators began at the western curbs of Third Street and extended west along California Street. The anti-Bush demonstrators began at the eastern curbs of Third Street and extended east to Fourth Street. The two groups were separated only by the 37-foot width of Third Street. Interactions between the anti-Bush demonstrators and the pro-Bush demonstrators were courteous and even jovial.

The President Decides to Dine at the Inn

47. While the President was en route to Jacksonville, he decided to dine at the Jacksonville Inn instead of at the Honeymoon Cottage. At about 7:00 P.M., the pro-Bush and anti-Bush demonstrators learned that the President was coming to dine at the Jacksonville Inn on the north side of California Street between Third and Fourth Streets. The Jacksonville Inn had a dining area located on a patio at the rear of the Inn.

48. After learning of the President's dinner plan, the participants in both the pro-Bush and anti-Bush demonstrations clustered more on the north side of California Street than on the south side. The respective locations of the group of pro-Bush demonstrators and Plaintiff Class of anti-Bush demonstrators are shown as "A" and "B", respectively, on the map attached as Exhibit A to this Second Amended Complaint. As shown on the map, the location of the eastern-most pro-Bush demonstrators was not significantly different from the location of the western-most anti-Bush demonstrators. Both sets of demonstrators had equal access to the President during his arrival at the Jacksonville Inn and would have had equal access during his departure had the anti-Bush demonstrators not been violently moved two blocks east as alleged below.

49. Shortly after 7:00 PM, just prior to the President's arrival at the patio dining area at the rear of the Jacksonville Inn, at the request of the Secret Service agent on site, a group of the State and Local Police Defendants' police officers dressed in riot gear cleared

the Third Street alley all the way to the patio dining area directly behind the Jacksonville Inn. Police also blocked Third Street, including both sidewalks, north of California Street. Riot-geared police officers cleared the California Street alley running along the east side of the Inn and were stationed at the entrance of the California Street alley to prevent any unauthorized persons from entering the alley. No demonstrators attempted to enter the California Street alley at any time after the police cleared the alley. At the intersection of Third and California Streets, the State and Local Police Defendants' police officers began barring members of both groups of demonstrators from crossing the streets, and confining them to the sidewalks on which they were standing.

50. The anti-Bush demonstrators along California Street did not have any access to the President or any line of sight to the dining patio at the rear of the Jacksonville Inn. As shown on Exhibit A, the anti-Bush demonstrators were blocked by the buildings along California Street—the U.S. Hotel, the Bijou, the Jacksonville Inn, and the Sterling Savings Bank—and by the riot-geared police officers stationed at the entrance of the California Street alley.

51. President Bush and his party arrived at the back of the Jacksonville Inn at approximately 7:15 PM, and the President entered the back patio of the Inn through the back patio door. The patio dining area was enclosed by a 6-foot high wooden fence, blocking a view of those in the patio dining area from the sight of all those outside that area.

52. Also present inside the Inn and the patio dining area were dozens of guests and diners. Defendants did not screen these persons or order or force them to leave the patio. Also present, just upstairs from the patio dining area, was a group of approximately thirty persons participating in an assemblage with expressive content, namely, an educational discussion of medical issues. Some members of the medical group, who came downstairs to get a glance at the President, found an unguarded door leading into the patio dining area, opened that door and stood looking at the President from a distance of about 15 feet.

The Secret Service Directs Removal of Anti-Bush Demonstrators

53. Fifteen minutes later at about 7:30 PM, after class members' anti-Bush chants and slogans could be heard within the patio where the President was dining, Secret Service Defendants Wood, Savage and John Doe 1 requested or directed Defendant Towe and the other Police Defendants to clear California Street of all persons between Third and Fourth Streets—that is, the members of Plaintiff Class—and to move them to the east side of Fourth Street and subsequently to the east side of Fifth Street.

54. The Defendants claim that the Defendant Secret Service agents told Defendant Towe and the Police Defendants that the reason for the Secret Service's request or direction was that they did not want anyone within handgun or explosive range of the President. To the extent the agents in fact made such an assertion, the assertion was false and Defendant

Towe and the Police Defendants knew or should have known that it was false, because there was no significant security difference between the two groups of demonstrators.

55. Had that been the true reason for the request or direction, the Defendant Secret Service agents would have requested or directed that all persons dining, staying at, or visiting the Inn who had not been screened by the Secret Service or the Police Defendants be removed from the Inn. Likewise, had that been the true reason for the request or direction, the Defendant Secret Service agents would have requested or directed that the pro-Bush demonstrators at the corner of Third and California be moved further to the west so that they would not be in range of the President as he travelled from the Inn to the Honeymoon Cottage where he was staying. The Honeymoon Cottage was at 115 Main Street, one block south of California Street and West of Third Street. The line marked "C" on Exhibit A shows the direction to the Honeymoon Cottage from the rear of the Jacksonville Inn.

56. Instead, the Defendant Secret Service Agents left the pro-Bush demonstrators on the Northwest and Southwest corners of Third and California Streets, marked as "A" on Exhibit A, to cheer for President Bush as he traveled to the Honeymoon Cottage, while causing the anti-Bush demonstrators to be violently moved two blocks east, well out of the President's view.

57. The Defendant Secret Service agents targeted only the anti-Bush demonstrators to be cleared from the area, even though they were much farther from the President than the unscreened diners, hotel guests, and other visitors, including the assembled medical group, inside the Inn, and even though they had no greater access to the President than the pro-Bush demonstrators. In fact, having moved the anti-Bush demonstrators two blocks east, the Defendant Secret Service agents left the pro-Bush demonstrators with unimpeded access to the President along the route to the Honeymoon Cottage, demonstrating that the purported reason for moving the anti-Bush demonstrators was false.

58. Defendants Wood, Savage and John Doe 1 did not direct or request that Defendant Towe or the other Police Defendants move or screen the pro-Bush demonstrators outside the Inn or the unscreened diners, hotel guests, and other visitors, including the assembled medical group, inside the Inn.

59. At approximately 7:45 PM, the Police Defendants formed a line of riot-geared police officers across California Street on Third Street, facing east (i.e., facing the anti-Bush demonstrators and with their backs to the pro-Bush demonstrators). Behind them was an armored personnel carrier. The Police Defendants made amplified announcements, unintelligible to many class members, that the assembly was now unlawful, and ordered Plaintiffs and Plaintiff Class of anti-Bush demonstrators to move from the sidewalks where they were lawfully assembled to the east side of

Fourth Street. The Police Defendants failed to contact Plaintiffs Elkovich or Vine, the known leaders of the anti-Bush demonstration, made no effort to coordinate with them, and, by restricting their movement, prevented them from assisting in communicating with Plaintiff Class.

The Police Defendants Violently Move the Anti-Bush Demonstrators

60. Without attempting to determine whether the assemblage understood the announcements, and without allowing time for the class of about 200 to 300 persons crowded on the sidewalks to move, the Police Defendants and their police officers, including officers clad in riot gear, forced the anti-Bush demonstrators to move east along California Street, in some cases by violently shoving Plaintiffs and Plaintiff Class members, striking them with clubs and firing pepper spray bullets at them.

61. The Police Defendants continued forcefully to move class members from where they were demonstrating, using clubs, pepper spray bullets, and forceful shoving, east along California Street until they had all crossed Fourth Street, and then to the east side of Fifth Street. After moving the class members across Fifth Street, the Police Defendants divided the class members into two groups, encircling each group and preventing class members from leaving the area. Some class members, including those with young children, were attempting to leave the area. Several families had become separated, including children;

some of whom were lost, frightened and traumatized as a result of the Police Defendants' actions.

62. During the entire time these actions were being taken against Plaintiffs and Plaintiff Class members, the Defendants did not take any action to move the pro-Bush demonstrators or to move the unscreened diners, hotel guests, and other visitors, including the assembled medical group, who were inside the Inn.

The Secret Service's Long History and Actual Policy of Discriminating Against First Amendment Expression

63. Since the early 1960s, each American President has employed an Advance Team to work together with the Secret Service to manage the twin goals of protecting the President and providing him access to the public in his public appearances and travels. Each President has established different policies in the balance between these two goals.

64. The Secret Service has a long history of going beyond security measures necessary to protect the President, and manipulating its security function to protect Presidents from First Amendment-protected expressions of opposition by individuals and groups. This has required the courts periodically to examine and to declare invalid, unlawful, or excessive, so-called security measures for which the Secret Service could not show a reasonable basis.

65. As long ago as 1969, in *Quaker Action Group v. Hickel*, 421 F.2d 1111, 1117 (D.C. Cir. 1969), the United States Court of Appeals for the District of Columbia

Circuit upheld a preliminary injunction against Secret Service instigated regulations limiting demonstrations on the sidewalk adjacent to the White House and in neighboring Lafayette Park. The court specifically rejected the notion that it must accept the Secret Service's purported security rationale, instead holding that "we must also assure ourselves that those conclusions rest upon solid facts and a realistic appraisal of the danger rather than vague fears extrapolated beyond any foreseeable threat." The court went on to note: "The history of this country, moreover, records no effort of which we are aware to assault a public figure by mass violence; assassinations have characteristically been the work of single individuals or at most small groups." The same statement is as true today as it was 40 years ago. And following a trial on the merits, the Court of Appeals concluded that the numerical limits sought by the Secret Service were not supportable.

66. The United States Court of Appeals for the Ninth Circuit has not ruled in a Secret Service case, but in *Bay Area Peace Navy v. U.S.*, 914 F.2d 1224, 1228 (9th Cir. 1990), the court invalidated a United States Coast Guard security zone, ruling that the government "is not free to foreclose expressive activity in public areas on mere speculation about danger . . . . [o]therwise the government's restriction on First Amendment expression in public areas would become essentially unreviewable."

67. The White House under President George W. Bush, more than any prior Presidency, sought to pre-

vent or minimize the President's exposure to dissent or opposition during his public appearances and travels, while at the same time maximizing—within the demands of reasonable security—his exposure to supporters and to the public in general.

68. This policy was set out in some detail in the official "Presidential Advance Manual," dated October 2002, instructing the White House Advance Team on how to keep protesters out of the President's vicinity and sight. A redacted copy of the "Presidential Advance Manual," which was produced and filed in *Rank v. Hamm*, U.S.D.C., S.D. W. Va., Case No. 2:04-cv-00997, is attached as Exhibit B.[1] Viewpoint discrimination by the Secret Service in connection with President Bush was the official policy of the White House. The unredacted excerpts include discussions about how to deal with protesters, how to disrupt protests, and how to insure that protesters are kept out of sight or hearing of the President and the media. These facts demonstrate not just a pattern and practice, but an official White House policy of seeking to stifle dissent.

69. The Secret Service Defendants worked closely with the Advance Team to achieve the goal set out in the Presidential Advance Manual, and to concoct, manipulate, and gerrymander false security rationales for the exclusion or distancing of opposition, dissent, or protest expressive activity from proximity to the

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[1] The reference to Exhibit C in the document is the exhibit referent it had in the West Virginia action.

President, while minimizing the distancing of the public in general and supporters.

70. The Secret Service's actual but unwritten policy and practice was to work with the White House under President Bush to eliminate dissent and protest from presidential appearances. When the President's plans changed on October 14, 2004, there was no time for the Advance Team to take action to stifle and suppress the protest. Instead, the President's team relied on the Secret Service to do so by directing and requesting local authorities to clear both sides of California Street between Third and Fourth Streets, and subsequently between Third and Fifth Streets, where the protesters opposing President Bush were congregated, while leaving undisturbed the nearby pro-Bush demonstrators, as well as the unscreened diners, hotel guests, and other visitors, including the assembled medical group, who were inside the Inn.

71. Defendants Secret Service and Basham have promulgated or caused to be promulgated written guidelines, directives, instructions and rules which purport to prohibit Secret Service agents from discriminating between anti-government and pro-government demonstrators, between demonstrators and others engaged in expressive assembly, and between demonstrators and members of the public not engaged in expressive assembly, but these documents do not represent the actual policy and practice of the Secret Service, and are a sham, designed to conceal and immunize from judicial review the actual policy

and practice described in paragraphs 63 to 70 of this Second Amended Complaint.

72. The actions of the Secret Service Defendants during the episode at the Jacksonville Inn on October 14, 2004, were an implementation of this actual policy and practice, which included employing, directing, requesting, or encouraging state and local authorities to assist in implementing the discriminatory policy.

73. Inasmuch as the First Amendment requires that governmental restrictions on expressive conduct be based on a compelling governmental interest unrelated to the fact that the conduct contains expressive content, the Secret Service policy and practices described in paragraphs 63 to 70 of this Second Amended Complaint and the Secret Service Defendants' actions at the Jacksonville Inn on October 14, 2004, violated three distinct principles of this First Amendment standard:

(a) Imposition of greater restrictions on Plaintiff Class than on the pro-Bush demonstrators outside the Inn violated the principle prohibiting viewpoint discrimination.

(b) Imposition of greater restrictions on Plaintiff Class than on the medical group assembled inside the Inn violated the principle prohibiting content discrimination against a political assemblage as compared to a non-political assemblage.

(c) Imposition of greater restrictions on Plaintiff Class than on individual diners and guests inside the Inn violated the principles prohibiting content and

or viewpoint discrimination against persons solely because they are assembled to express a political or opposing point of view.

74. The Secret Service Defendants had no valid security reason to request or order the eviction of Plaintiffs and Plaintiff Class from the north and south sidewalks of California Street between Third and Fourth Streets on October 14, 2004.

75. In the United States, no attempt to harm any President has ever been made from a group assembled to express opposition, protest, or dissent from the President's policies.

76. Plaintiff Class of anti-Bush demonstrators were a peaceful group, consisting of families, elderly persons, children, and mothers with babes in arms, whose leaders had contacted Defendants Winters and Towe in advance to assure them of their intention to protest peacefully in a law abiding manner.

77. The Defendant Secret Service agents had at least 20 minutes from the time the President decided to dine at the Jacksonville Inn to assess the security situation at and around the Inn. During that time, the Defendant Secret Service agents had the police clear the two alleys adjacent to the Inn, but made no effort to have the anti-Bush demonstrators moved. It was only after the President was in the patio dining area and the chants of the anti-Bush demonstrators could be heard from the patio that the Defendant Secret Service agents targeted Plaintiffs and Plaintiff Class of anti-Bush demonstrators to be moved from the public sidewalks on California Street.

78. This action by the Secret Service Defendants did not comport with normal, lawful Secret Service security measures during Presidential public appearances or visits to hotels, restaurants, or other publicly accessible buildings, absent threats, reports or other special circumstances suggesting the need for unusual security measures. Specifically:

(a) There had been no reports, threats, or other information suggesting a potential attempt to harm the President, or any other special circumstances suggesting the need for unusual security measures.

(b) It is not the general practice of the Secret Service, in the absence of special circumstances, to establish a security zone extending an entire city or town block around hotels, restaurants, or other buildings the President may be visiting in the United States.

(c) The Secret Service has specific statutory authority to establish security zones within "buildings and grounds" visited by the President, but not on adjacent public sidewalks and streets.

(d) On information and belief, the criterion of keeping people out of handgun range of the President was made up for this particular occasion, having no precedent in any prior security zones or Presidential appearances, in the absence of special circumstances.

(e) On information and belief, the criterion of keeping people out of explosive range of the President was made up for this particular occasion, having no

precedent in any prior security zones or Presidential appearances, in the absence of special circumstances.

79. Plaintiff Class of anti-Bush demonstrators posed no greater risk of assaulting the President with a handgun or explosive than the pro-Bush group of demonstrators. The Jacksonville Inn and other buildings on California Street and the riot-geared police securing the California Street alley blocked the view and line of sight from the sidewalk in front of the Inn and along the north side of California Street to the patio dining area at the rear of the Inn, making it impossible for Plaintiff Class of anti-Bush demonstrators to assault the President with a handgun or explosive from that location.

80. Given their location, Plaintiff Class of anti-Bush demonstrators posed no greater risk and in fact posed less risk of assaulting the President with a handgun or explosive, than the guests, diners, and the assembled medical group inside the Inn. Specifically, the Secret Service Defendants knew or should have known:

(a) Plaintiff Class of anti-Bush demonstrators had no more advance knowledge than the people inside the Inn that the President was coming to the Inn for dinner in the patio dining area; thus, there was no more reason to suspect them of harboring hidden weapons or plans for assault than the people inside the Inn.

(b) The guests, diners, and the assembled medical group inside the Inn posed a greater risk, if any, of assaulting the President with a handgun or

explosive than anyone outside of the Inn; for example, several members of the medical group assembled inside the Inn opened an unguarded door to the patio dining area and stood looking at the President from a distance of only fifteen feet.

(c) The only operative distinction between the unscreened diners, guests and other visitors, including the assembled medical group, inside the Inn, and Plaintiff Class of anti-Bush demonstrators outside the Inn, was that the anti-Bush demonstrators were expressing a point of view opposed to the President and his policies and that those inside the Inn were not doing so.

81. The actions of the Secret Service Defendants at the Jacksonville Inn on October 14, 2004, were consistent with and taken pursuant to the actual but unwritten policy and practice of the Secret Service to shield the President from seeing or hearing anti-Bush demonstrators and to prevent anti-Bush demonstrators from reaching the President with their message. The actions of the Secret Service Defendants at the Jacksonville Inn on October 14, 2004, were also consistent with the Bush administration's official policy of shielding the President from seeing or hearing anti-Bush demonstrators and preventing anti-Bush demonstrators from reaching the President with their message as reflected in the Presidential Advance Manual, redacted portions of which are attached as Exhibit B to this Second Amended Complaint.

82. According to published reports, the Secret Service has engaged in these kinds of actions against

anti-government expressive activity on numerous other occasions, including, without limitation:

(a) At President Bush's appearance at Western Michigan University in Kalamazoo, Michigan, on March 27, 2001, a demonstrator was carrying a sign sarcastically commenting on the prior Presidential election ("Welcome Governor Bush"). At the direction of the Secret Service, a university police officer ordered the demonstrator to go to a "protest zone" behind an athletic building located 150-200 yards from the parade route even though several hundred people who were not carrying signs were allowed to remain in the area where the protester had stood. The protest zone was located so that people sent there could not be seen by the President or his motorcade. When the demonstrator refused to enter the protest zone, but insisted on standing where other people had been allowed to gather, he was arrested, also at the direction of the Secret Service.

(b) On August 23, 2002, in Stockton, California, at an appearance in a local park to support a Republican gubernatorial candidate, at the direction of the Secret Service, protesters were ordered behind a row of large, Greyhound-sized buses, which placed them out of sight and earshot of their intended audience, and were advised that if they went to the other side of the buses, a location visible to those attending the event, they would be arrested. People who carried signs supporting the President's policies and spectators not visibly expressing any views were al-

lowed to gather in front of the buses, where event attendees could see them.

(c) On January 22, 2003, in St. Louis, Missouri, President Bush made a visit to announce an economic plan. At the direction of the Secret Service, protesters carrying signs opposing the economic plan and criticizing the President's foreign policy were sent to a "protest zone" located in a public park, three blocks away and down an embankment from where the President was speaking. Neither people attending the event nor people in the motorcade could see the protesters in the protest zone. One protester was arrested for refusing to enter the protest zone. Standing near the location where the protester was arrested was a group of people who were not asked to move, including a woman who carried a sign reading, "We Love You President Bush," who was neither ordered into the protest zone nor arrested.

(d) On September 2, 2002, in Neville Island, Pennsylvania, in connection with a speech by President Bush, at the direction of the Secret Service, anti-Bush demonstrators were sent to a "designated free speech zone" located on a large baseball field one-third of a mile away from where President Bush was speaking. Only people carrying signs critical of the President were required to enter and remain. Many people carrying signs supporting the President and his policies were allowed to stand alongside the motorcade route right up to where the President was speaking. When retired steelworker Bill Neel refused to enter the protest zone and insisted on being allowed to stand

where the President's supporters were standing, he was arrested for disorderly conduct and detained until the President had departed.

(e) In December 2002, in Philadelphia, Pennsylvania, at the direction of the Secret Service, protesters opposed to President's Bush's then-proposed tax cut plan were required to congregate in a protest zone well out of sight to the route to be taken by the President and the hotel where the President would be staying, while members of the public supporting the President or not expressing a view opposed to the President were permitted access to the sidewalks adjacent to the hotel and along the route he would be traveling.

(f) In May 2003, in connection with a speech by President Bush in Omaha, Nebraska, a group opposed to the President's tax cut plan planned a protest during the president's stop at a local plastics plant. At the direction of the Secret Service, the demonstrators were required to hold their protest more than half a mile away from the event.

(g) On June 17, 2003, in Washington, D.C., the President spoke at the Hilton Hotel. Protesters from the Children's Defense Fund criticizing the President's policies were picketing on the north side of T Street, adjacent to the hotel. A Secret Service agent, who showed them his badge, directed the protesters across the street. Spectators not visibly expressing any views were allowed to walk on the sidewalk in front of the hotel.

(h) In July 2003, in connection with a protest at a presidential visit to the Treasury Financial Facility in Philadelphia, Pennsylvania, demonstrators critical of President Bush were treated differently and less favorably than demonstrators supportive of the President. After the anti-Bush demonstrators were told that no one could protest directly across the street from the building, they agreed to a location diagonal from the building the President was visiting. When they noticed that pro-Bush demonstrators were being permitted to be directly across the street (where the anti-Bush demonstrators had been told no one would be permitted), they complained, and the Secret Service attempted to move the anti-Bush demonstrators even farther away. When a court blocked the local police and Secret Service from doing so, they then parked several large police vans in front of the anti-Bush demonstrators, thereby ensuring that the demonstrators would not be seen or heard by President Bush.

(i) On July 4, 2004, in Charleston, West Virginia, Jeffrey and Nicole Rank were arrested at the direction of the Secret Service while peacefully attending a speech by President Bush. Their "crime" was wearing t-shirts critical of the President. The charges against the Ranks were dropped. The Ranks sued and ultimately received $80,000 in settlement.

(j) On July 13, 2004, in Duluth, Minnesota, in connection with a presidential visit, the Secret Service had photographs posted at security checkpoints of three individuals who had indicated in a news story that they intended to protest against the President.

(k) On August 26, 2004, in Farmington, New Mexico, the Secret Service denied entrance to an individual who had a ticket for a Bush-Cheney rally because they believed the individual was there to protest.

(l) On September 9, 2004, in Colmar, Pennsylvania, a suburb of Philadelphia, the Secret Service, in conjunction with Bush campaign staffers, directed the arrest and detention of seven AIDS activists who protested during a speech by President Bush and the Secret Service agents then threatened to bar journalists who sought access to the activists from returning to the speech.

83. These other instances of actions by the Secret Service against anti-governmental expressive conduct constitute a pattern and practice, warranting judicial relief.

84. The Secret Service's sham written guidelines, directives, instructions and rules described in paragraph 71 of this Complaint do not represent the actual policy and practice of the Secret Service, but rather were designed to conceal and immunize from judicial review the Secret Service's unlawful and unconstitutional pattern and practices.

85. Secret Service agents have engaged in conduct and actions to suppress and stifle anti-governmental expressive conduct and/or speech or conduct critical of Secret Service protectees and have not been disciplined or corrected for engaging in such actions.

Plaintiffs' Injuries

86. As a result of Defendants' actions, Plaintiffs and Plaintiff Class members suffered damages in the form of loss of their rights under the United States Constitution, First, Fourth, Fifth and Fourteenth Amendments, the Oregon Constitution, Article I, Sections 8, 9, 20, and 26, and their common law rights, and physical and emotional injuries, pain and suffering. The experience was especially traumatic, both physically and emotionally, for the children, some of whom are now fearful about attending future demonstrations and of police officers.

87. Plaintiffs, Plaintiff Class members and other Green Party members desire and intend to continue demonstrating peacefully in proximity to federal officials who are protected by the Secret Service, both in Jackson County and elsewhere. It is likely and foreseeable that Plaintiffs, Plaintiff Class members and other Green Party members will again be harmed by the practices described in this Second Amended Complaint.

88. Plaintiffs, Plaintiff Class members and Green Party members are under a real and immediate threat that, unless the Secret Service Defendants and the State and Local Police Defendants are enjoined from doing so, they will continue the pattern and practices described in this Second Amended Complaint.

89. Such pattern and practices threaten Plaintiffs, Plaintiff Class and Green Party members with being banned from exercising their First Amendment rights in locations proximate to the President, Vice Presi-

dent, or other Secret Service protectees, despite the fact that pro-government demonstrators and/or other unscreened members of the public whose assembling does not involve political or expressive content will be allowed in such locations.

90. Such pattern and practices threaten Plaintiffs, Plaintiff Class and Green Party members with being subjected to having lawful and orderly demonstrations which they organize or in which they participate stopped, disrupted, and assaulted in the manner that occurred in the October 14, 2004, Jacksonville demonstration.

91. The aforesaid threats inhibit Plaintiffs, Plaintiff Class members and Green Party members from organizing and participating in such demonstrations, from encouraging others to do so, and from encouraging others to bring their children to these events as an educational democratic activity.

92. Plaintiffs and Plaintiff Class members have no adequate remedies at law for the injuries described in paragraphs 87 to 91 of this Second Amended Complaint.

93. At the time that the Defendants took the aforesaid actions against them, class members were exercising federal and state constitutional rights and common law rights and were not in violation of any law. Defendants violated the federal and state constitutional rights and common law rights of the class members. There was no reasonable or lawful basis for the Defendants to take such actions.

94. The actions of Defendants were within the scope of their employment.

95. The individual Police Defendants were acting under color of state law.

96. Defendants Towe, Rodriguez, Winters and the other individual State and Local Police Defendants personally directed and approved of the actions of the police against Plaintiff Class, and personally directed and approved of permitting the pro-Bush demonstrators and unscreened diners, guests, and visitors, including the assembled medical group, inside the Jacksonville Inn to remain in the vicinity undisturbed and unrestricted.

97. The Police Defendants' actions and the actions of the police officers in using overwhelming and excessive force, including the use of officers clad in riot gear, against unarmed, law-abiding peaceful demonstrators exercising their core First Amendment rights of speech and assembly on public sidewalks were the custom, policy or practice of the State of Oregon and Defendants City of Jacksonville and Jackson County and Municipal Does respectively, or were established as such by the individual Police Defendants in taking those actions. The individual Police Defendants had the final decision-making authority and responsibility for establishing the policies of their respective employers. The individual Police Defendants' decisions to order and implement the aforesaid police actions constituted the official policy of their respective public employers.

98. Both the rights that Plaintiff Class members were exercising, and the fact that the Defendants' actions against them violated those rights, were clearly established and well settled law as of October 14, 2004. Accordingly, the Defendants had no reasonable basis to believe that the Defendants' actions were lawful.

99. The Defendants' actions against Plaintiff Class in discriminating against them based on the fact, content, and/or viewpoint of their expression and in the use of overwhelming and constitutionally excessive force against them were the result of inadequate and improper training, supervision, instruction and discipline of the Secret Service agents under the personal direction of Defendant Basham and of the police officers under the personal directions of the State and Local Police Defendants. Such inadequate and improper training, supervision, instruction and discipline are the custom and practice of the Defendants. By the practice or custom of failing to adequately and properly train, supervise, instruct or discipline their police officers, the Defendants have directly caused the violations of rights that are the subject of this action.

FIRST CLAIM FOR RELIEF

• Violation of First, Fourth, and Fifth Amendment Rights •

Against the Secret Service Defendants Only

100. Plaintiffs reallege and incorporate by reference the preceding paragraphs as if fully set forth herein.

101. On information and belief, all Defendants were acting jointly and in concert in taking the actions alleged.

102. The individual Secret Service Defendants, except Defendant Sullivan, are liable in their individual or personal capacities to Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) for compensatory damages under *Bivens* v. *Six Unknown Agents*, 403 U.S. 388 (1971), for the violation of their rights of freedom of speech, assembly, and association under the First Amendment to the United States Constitution, and of their rights to be free from unreasonable seizure and assault under the Fourth and Fifth Amendments.

103. The individual Secret Service Defendants, except Defendant Sullivan, acted willfully and maliciously, or with indifference or reckless disregard of Plaintiff Class members' rights or safety, and Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) are therefore entitled to an award of punitive damages against the individual Secret Service Defendants in their individual or personal capacities, except Defendant Sullivan, in an amount to be established at trial.

104. Plaintiffs and Plaintiff Class are entitled to declaratory relief under *Bivens* against the individual Secret Service Defendants in their individual or personal capacities, except Defendant Sullivan, declaring that one or more of them violated Plaintiffs and Plaintiff Class's rights of freedom of speech, assembly and association under the First Amendment to the United

States Constitution, and their rights to be free from unreasonable seizure and assault under the Fourth and Fifth Amendments.

105. Plaintiffs and Plaintiff Class are entitled to declaratory and supplemental injunctive relief under 5 U.S.C. § 702 against all Secret Service Defendants in their official capacities and all persons acting in the official capacities as their agents or in concert with them, declaring as unlawful and prohibiting the Secret Service Defendants, and all persons acting as their agents or in concert with them from engaging in the practice of, or continuing a pattern and practice of, or requesting or encouraging others to engage in the practice of:

(a) Barring or forcing a lawful assembly of people from any area where they have a lawful right to assemble, where there is no reasonable security reason to so bar or force them;

(b) Barring or forcing a lawful assembly of people from areas where other unscreened members of the public are allowed to congregate or be present;

(c) Barring or forcing anti-government demonstrators from areas where pro-government demonstrators are allowed to be present;

(d) Using excessive force to move nonviolent persons;

(e) Using riot-geared officers at nonviolent demonstrations; or

(f) Using non-lethal weapons or any form of chemical agents against nonviolent demonstrators.

SECOND CLAIM FOR RELIEF

•42 U.S.C. § 1983: Violation of First, Fourth, and Fifth Amendment Rights•

Against the State and Local Police Defendants

106. Plaintiffs reallege and incorporate by reference the preceding paragraphs as if fully set forth herein.

107. The State and Local Police Defendants were acting jointly and in concert and under color of state law to violate the constitutional rights of Plaintiffs and Plaintiff Class.

108. The Police Defendants, except Defendants McLain and Martz, are liable in their individual or personal capacities to Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) for compensatory damages under 42 U.S.C. § 1983 and for attorneys fees under 42 U.S.C. § 1988 for the violation of their rights of freedom of speech, assembly and association under the First Amendment to the United States Constitution, and of their rights to be free from unreasonable seizure and assault under the Fourth and Fifth Amendments, and to all these rights as incorporated and applied through the Fourteenth Amendment.

109. The individual Police Defendants, except Defendants McLain and Martz, acted willfully and maliciously, or with indifference or reckless disregard of

Plaintiff Class members' rights or safety, and Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) are therefore entitled to an award of punitive damages against the individual Police Defendants, except Defendants McLain and Martz, in their individual or personal capacities in an amount to be proven at trial.

110. Plaintiffs and Plaintiff Class are entitled to declaratory relief against the Police Defendants in their individual or personal capacities, except Defendants McLain and Martz, declaring that one or more of them violated Plaintiffs and Plaintiff Class's rights of freedom of speech, assembly and association under the First Amendment to the United States Constitution, and their rights to be free from unreasonable seizure and assault under the Fourth and Fifth Amendments, as incorporated and applied through the Fourteenth Amendment.

111. Plaintiffs and Plaintiff Class are entitled to injunctive relief against the Police Defendants in their official capacities and all persons acting in their official capacities as their agents or in concert with them, prohibiting the Police Defendants, and all persons acting as their agents or in concert with them from engaging in the practice of, or continuing a pattern and practice of, or requesting or encouraging others to engage in the practice of:

(a) Barring or forcing a lawful assembly of people from any area where they have a lawful right to assemble, where there is no reasonable security reason to so bar or force them;

(b) Barring or forcing a lawful assembly of people from areas where other unscreened members of the public are allowed to congregate or be present;

(c) Barring or forcing anti-government demonstrators from areas where pro-government demonstrators are allowed to be present;

(d) Using excessive force to move nonviolent persons;

(e) Using riot-geared officers at nonviolent demonstrations; or

(f) Using non-lethal weapons or any form of chemical agents against nonviolent demonstrators.

THIRD CLAIM FOR RELIEF

• Violation of Rights Under Oregon Constitution •

Against the Local Police Defendants

112. Plaintiffs reallege and incorporate by reference the preceding paragraphs as if fully set forth herein.

113. The Local Police Defendants are liable to Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) for compensatory damages for the violation of their rights under the Oregon Constitution, Article I, Sections 8, 9, 20 and 26.

114. Plaintiffs and Plaintiff Class are entitled to declaratory and injunctive relief against the Local Police Defendants, declaring that one or more of them violated Plaintiffs and Plaintiff Class's rights of freedom of speech, assembly and association, and their

rights to be free from unreasonable seizure and assault under the Oregon Constitution, Article I, Sections 8, 9, 20 and 26, and prohibiting the Local Police Defendants, and all persons acting as their agents or in concert with them from engaging in the practice of, or continuing a pattern and practice of, or requesting or encouraging others to engage in the practice of:

(a) Barring or forcing a lawful assembly of people from any area where they have a lawful right to assemble, where there is no reasonable security reason to so bar or force them;

(b) Barring or forcing a lawful assembly of people from areas where other unscreened members of the public are allowed to congregate or be present;

(c) Barring or forcing anti-government demonstrators from areas where pro-government demonstrators are allowed to be present;

(d) Using excessive force to move nonviolent persons;

(e) Using riot-geared officers at nonviolent demonstrations; or

(f) Using non-lethal weapons or any form of chemical agents against nonviolent demonstrators.

115. Plaintiffs and Plaintiff Class are entitled to an award of attorney fees against the Local Police Defendants pursuant to *Armatta v. Kitzhaber*, 327 Or 250 (1998).

FOURTH CLAIM FOR RELIEF

Violation of Oregon Common Law Against the Local Police Defendants

116. Plaintiffs reallege and incorporate by reference the preceding paragraphs as if fully set forth herein.

117. The Local Police Defendants are liable to Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) for compensatory damages under the common law of Oregon for assault and battery, false imprisonment and negligence.

118. Timely notices of claims were filed pursuant to the Oregon Tort Claims Act.

PRAYER FOR RELIEF

WHEREFORE, the named Plaintiffs, on behalf of themselves and Plaintiff Class, request:

1. An Order certifying this action as a class action pursuant to Rule 23(a) and (b)(3) of the Federal Rules of Civil Procedure, certifying the named Plaintiffs as class representatives and designating Steven M. Wilker, Paul W. Conable, James K. Hein, Ralph J. Temple, and Arthur B. Spitzer as class counsel;

2. On the First Claim for Relief, a judgment:

(a) For compensatory damages in favor of Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) against one or more of the individual Secret Service Defendants in their

individual or personal capacities, except Defendant Sullivan, jointly and severally;

(b) For punitive damages in favor of Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) against one or more of the individual Secret Service Defendants in their individual or personal capacities, except Defendant Sullivan;

(c) Declaring that one or more of the individual Secret Service Defendants in their individual or personal capacities, except Defendant Sullivan, violated Plaintiffs and Plaintiff Class's rights of freedom of speech, assembly and association under the First Amendment to the United States Constitution, and their rights to be free from unreasonable seizure and assault under the Fourth and Fifth Amendments; and

(d) Declaring unlawful the following practices, and ordering supplemental injunctive relief under 5 U.S.C. § 702, prohibiting the Secret Service Defendants in their official capacities, and all persons acting in their official capacities as their agents or in concert with them from engaging in the practice of, or continuing a pattern and practice of, or requesting or encouraging others to engage in the practice of:

(i) Barring or forcing a lawful assembly of people from any area where they have a lawful right to assemble, where there is no reasonable security reason to so bar or force them;

(ii) Barring or forcing a lawful assembly of people from areas where other unscreened

members of the public are allowed to congregate or be present;

(iii) Barring or forcing anti-government demonstrators from areas where pro-government demonstrators are allowed to be present;

(iv) Using excessive force to move nonviolent persons;

(v) Using riot-geared officers at nonviolent demonstrations; or

(vi) Using non-lethal weapons or any form of chemical agents against nonviolent demonstrators.

3. On the Second Claim for Relief, a judgment:

(a) For compensatory damages in favor of Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) against one or more of the individual Police Defendants in their individual or personal capacities, except Defendants McLain and Martz, jointly and severally;

(b) For punitive damages in favor of Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) against one or more of the individual Police Defendants in their individual or personal capacities, except Defendants McLain and Martz;

(c) Declaring that one or more of the individual Police Defendants in their individual or personal capacities, except Defendants McLain and Martz, violated Plaintiffs and Plaintiff Class's rights of free-

dom of speech, assembly and association under the First Amendment to the United States Constitution, and their rights to be free from unreasonable seizure and assault under the Fourth and Fifth Amendments, as incorporated and applied through the Fourteenth Amendment; and

(d) Enjoining the Police Defendants in their official capacities, and all persons acting in their official capacities as their agents or in concert with them from engaging in the practice of, or continuing a pattern and practice of, or requesting or encouraging others to engage in the practice of:

(i) Barring or forcing a lawful assembly of people from any area where they have a lawful right to assemble, where there is no reasonable security reason to so bar or force them;

(ii) Barring or forcing a lawful assembly of people from areas where other unscreened members of the public are allowed to congregate or be present;

(iii) Barring or forcing anti-government demonstrators from areas where pro-government demonstrators are allowed to be present;

(iv) Using excessive force to move nonviolent persons;

(v) Using riot-geared officers at nonviolent demonstrations; or

(vi) Using non-lethal weapons or any form of chemical agents against nonviolent demonstrators.

4. On the Third Claim for Relief, a judgment:

(a) For compensatory damages in favor of Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) and against Local Police Defendants for the violation of their rights under the Oregon Constitution, Article I, Sections 8, 9, 20 and 26.

(b) Declaring that one or more of the Local Police Defendants violated Plaintiffs and Plaintiff Class's rights of freedom of speech, assembly and association, and their rights to be free from unreasonable seizure and assault under the Oregon Constitution, Article I, Sections 8, 9, 20 and 26;

(c) Enjoining the Local Police Defendants, and all persons acting as their agents or in concert with them from engaging in the practice of, or continuing a pattern and practice of, or requesting or encouraging others to engage in the practice of:

(i) Barring or forcing a lawful assembly of people from any area where they have a lawful right to assemble, where there is no reasonable security reason to so bar or force them;

(ii) Barring or forcing a lawful assembly of people from areas where other unscreened members of the public are allowed to congregate or be present;

(iii) Barring or forcing anti-government demonstrators from areas where pro-government demonstrators are allowed to be present;

(iv) Using excessive force to move nonviolent persons;

(v) Using riot-geared officers at nonviolent demonstrations; or

(vi) Using non-lethal weapons or any form of chemical agents against nonviolent demonstrators.

5. On the Fourth Claim for Relief, a judgment for compensatory damages in favor of Plaintiffs and Plaintiff Class (but not including Plaintiff Jackson County Green Party) and against Local Police Defendants under the common law of Oregon for assault and battery, false imprisonment and negligence.

6. Pre-and post-judgment interest on all amounts awarded;

7. Costs, disbursements, and reasonable attorney fees; and

8. Such other and further relief, including injunctive relief, as is just and proper under the circumstances.

JURY DEMAND

Plaintiffs request a jury trial for all issues so triable.

DATED Oct. 15, 2009

TONKON TORP LLP
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Cooperating Attorney for ACLU Foundation of Oregon, Inc.

EXHIBIT A TO SECOND AMENDED COMPLAINT

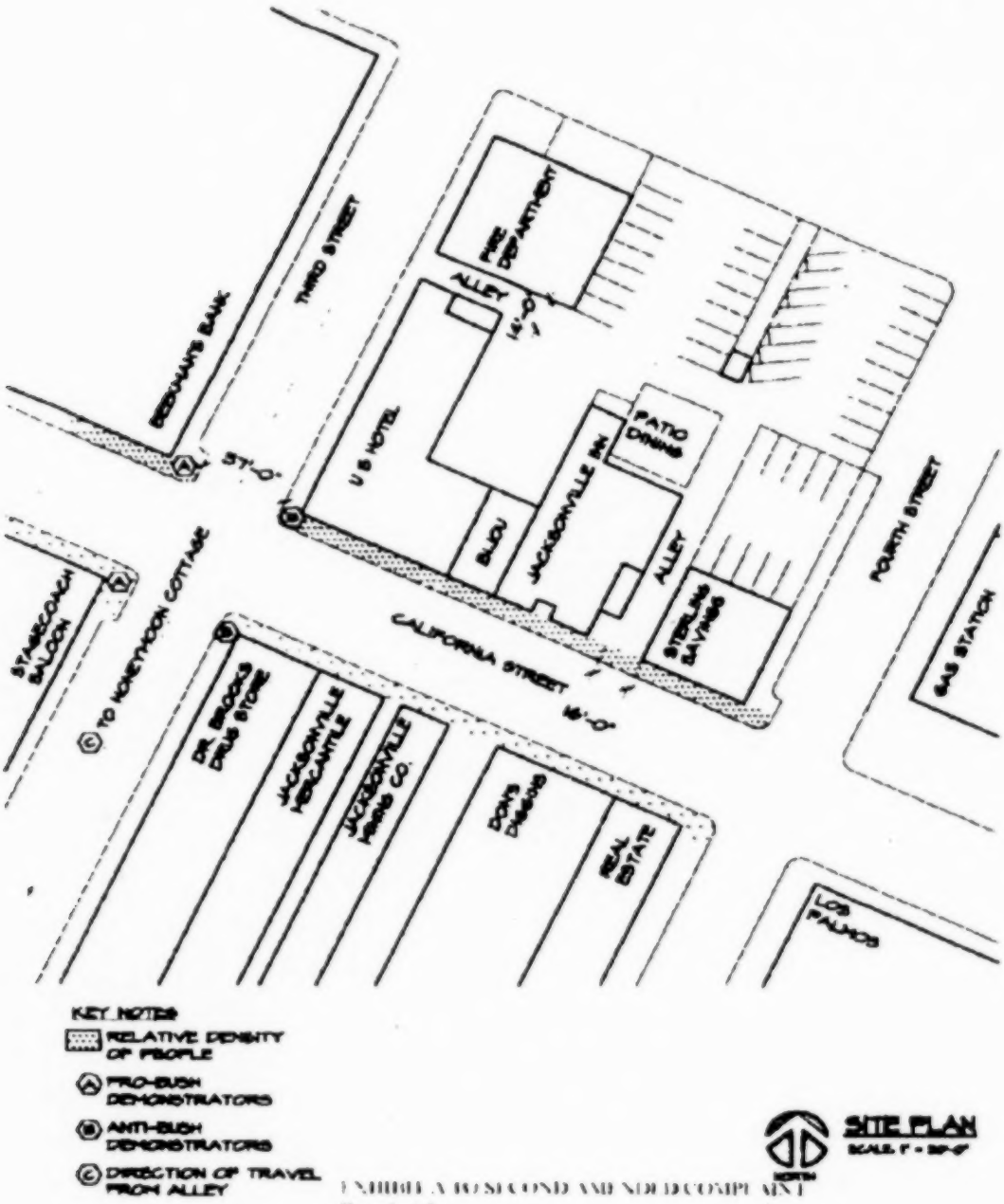

EXHIBIT A TO SECOND AMENDED COMPLAINT
Page 1 of 1

EXHIBIT B TO SECOND AMENDED COMPLAINT

PRESIDENTIAL ADVANCE MANUAL

OFFICE OF PRESIDENTIAL ADVANCE

OCTOBER 2002

NOTE: It is a violation of Federal law to duplicate or reproduce this manual without permission. It is not to be photocopied or released to anyone outside of the Executive Office of the President, White House Military Office or United States Secret Service. It has been developed for your guidance and is intended for your personal use. For more information, please contact the Office of Presidential Advance at (202) 456-5309.

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[Pages 2-11 redacted]

[redacted]

Summary

[redacted]

The President participates in various types of events. However the principles and guidelines covered in this manual can be applied to any type of event. Common events are speeches (to both large and small groups), rallies, roundtable meetings and tours.

[Pages 13-31 redacted]

Section V. Crowd Raising and Ticket Distribution

[redacted]

[redacted]

The Lead Advance will assign a member of the Advance Team or trusted volunteer to help raise the crowd and to organize a ticket distribution system. Proper ticket distribution is vital to creating a well-

balanced crowd and deterring potential protestors from attending events. The amount and type of tickets will be determined on an event basis by the Lead Advance and the Advance Office. Each ticket type will be numbered in order to track distribution and facilitate the placement of groups or people at the event.

Distribution

Tickets will be sent to the Lead Advance for distribution. The Office of Presidential Advance, the Office of Political Affairs, and the division responsible for the event will determine the distribution groups. In most cases, tickets should be distributed from the Advance Staff office. The Lead Advance will choose a trusted local volunteer to handle the actual distribution of tickets. Groups will be allocated tickets by number and must sign for tickets upon pick-up. Groups should be encouraged to request only the amount of tickets that they can use and tickets that are not issued must be returned to the Lead Advance

[redacted]

[redacted]

Typically, tickets will be divided into two different categories. In some cases, depending on the type and

event size, there will be additional categories added. There will also be an additional 15-20 percent above the tickets ordered printed in order to ensure that the event is full and there are no empty seats or areas. The categories are:

VIP	These tickets should be used to highlight a group of involved in the theme of event and in limited numbers to members of the State Party, Local Officials, the Host of the Event, or other groups extremely supportive of the Administration. These seats are usually located behind the podium or in the area between the stage and the main camera platform.
GENERAL	Tickets distributed as general seating. These tickets represent the bulk of the seating at large events.

Ticket Collection

Ticket collection at events should take place prior to the magnetometer checkpoint. Volunteers should be used to form the crowd into lines, check for signs or protestors, and to remove the stubs on official tickets. Homemade signs are not allowed at events.

[redacted]

Demonstrators

Always be prepared for demonstrators, even if the local organization tells you that there will not be any. It is the responsibility of the Lead Advance to have in place an effective plan for dealing with demonstrators.

Preventing Demonstrators

As mentioned, all Presidential events must be ticketed or accessed by a name list. This is the best method for preventing demonstrators. People who are obviously going to try to disrupt the event can be denied entrance at least to the VIP area between the stage and the main camera platform. That does not mean that supporters without tickets cannot be given tickets at the door and gain entrance to the event. It is also <u>not</u> the responsibility of the Secret Service to check the tickets of the people entering. They are concerned whether the person is a threat physically to The President and not a heckler. It is important to have your volunteers at a checkpoint before the Magnetometers in order to stop a demonstrator from getting into the event. Look for signs that they may be carrying, and if need be, have volunteers check for folded cloth signs that demonstrators may be bringing to the event.

For fundraising events, [redacted]

Preparing for demonstrators

There are several ways the advance person can prepare a site to minimize demonstrators. First, as

always, work with the Secret Service and have them ask the local police department to designate a protest area where demonstrators can be placed; preferably not in view of the event site or motorcade route.

The formation of "rally squads" is a common way to prepare for demonstrators by countering their message. This tactic involves utilizing small groups of volunteers to spread favorable messages using large hand held signs, placards, or perhaps a long sheet banner, and placing them in strategic areas around the site.

These squads should be instructed always to look for demonstrators. The rally squad's task is to use their signs and banners as shields between the demonstrators and the main press platform. If the demonstrators are yelling, rally squads can begin and lead supportive chants to drown out the protestors (USA!, USA!, USA!). As a last resort, security should remove the demonstrators from the event site. The rally squads can include, but are not limited to, college/ young republican organizations, local athletic teams, and fraternities/ sororities.

For larger rallies, the squads should be broken up into groups of approximately 15-25 people. A squad should be placed immediately in front of the stage, immediately in front of the main camera platform, close to the cut platform, immediately behind the stage area (if people are being used as the backdrop), and at least one squad should be 'roaming' throughout the perimeter of the event to look for potential problems.

Being aware of Demonstrators

It is important for the Advance Team and all volunteers to be on the lookout for potential demonstrators. Volunteers should be instructed to contact the Advance person on site (whether it is the Lead, Press or Site Advance) when they see demonstrators. Always check with local police to inquire of any demonstration permits issued prior to a visit.

Handling Demonstrators

Once a group of demonstrators has been identified, the Advance person must decide what action to take. If it is determined that the media will not see or hear them and that they pose no potential disruption to the event, they can be ignored. On the other hand, if the group is carrying signs trying to shout down the President, or has potential to cause some greater disruption to the event, action needs to be taken immediately to minimize the demonstrator's effect.

Before reacting to demonstrators, the Advance person should inform the rest of the Advance Team, the Tour Director, and the Press Advance Director of the situation. Be prepared to give the number of demonstrators, location(s), a description, and their issue/ organization.

If the demonstrators appear to be a security threat notify the Secret Service immediately. If demonstrators appear likely to cause only a political disruption, it is the Advance person's responsibility to take appropriate action. Rally squads should be dis-

patched to surround and drown out demonstrators immediately.

Remember - <u>avoid physical contact with demonstrators!</u> Most often, the demonstrators want a physical confrontation. Do not fall into their trap! Also, do not do anything or say anything that might result in the physical harm to the demonstrators. Before taking action, the Advance person must decide if the solution would cause more negative publicity than if the demonstrators were simply left alone.

[Pages 36-66 redacted]

The White House Office of Administration (OA)

[redacted]

Events

While on the road, you will encounter two classifications of events: Official and Political. Official events are those that the President is participating in on behalf of the Administration. These may include Education, Welfare, Defense or any topic on which the President is introducing or advocating an issue. All costs from these events are handled by OA, regardless of the source of payment. Your OA Representative will be responsible for payment for all costs associated with the event, such as sound, light, staging, pipe and

drape, bike rack, etc. It is extremely important that you collect invoices from vendors as soon as possible, allowing you and the OA Representative to review the invoice for inaccuracies and validity.

The OA Representative handles no part of and is not responsible for any cost incurred for a political event. Political events are those held on behalf of a particular candidate or officeholder and typically involve fund-raising activities. Federal law prohibits OA Representatives from having any participation in such events.

[redacted]

If you are handling the political part of a trip, the Republican National Committee will handle your per diem and expenses.

[Pages 68-103 redacted]

OPPOSITION BRIEF

RECORD
AND
BRIEFS

No. 13-115

In The Supreme Court of the United States

TIM WOOD AND ROB SAVAGE,

Petitioners,

v.

MICHAEL MOSS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners' Questions Presented are premised on an inaccurate reading of the court of appeals' opinion and of respondents' Second Amended Complaint. Accepting respondents' well-pled factual allegations as true for purposes of the motion to dismiss, the appropriate questions presented are:

1. Whether the court of appeals properly concluded that respondents have adequately pled a plausible claim for viewpoint discrimination where the Second Amended Complaint alleged that (a) petitioners ordered respondents to be moved to a position more than twice as far from the President as his supporters so that respondents' protest message could neither be seen nor heard; (b) the disfavored treatment received by respondents was consistent with at least a dozen other incidents involving Secret Service agents during the first four years of the administration of President George W. Bush; and (c) the proffered security rationale for petitioners' actions was pretextual as demonstrated by their treatment of the President's supporters and the other diners and guests at the Inn.

2. Whether the court of appeals properly concluded that petitioners were not entitled to qualified immunity where they singled out respondents for differential treatment based on the viewpoint of their political speech.

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Butler v. United States, 365 F. Supp. 1035 (D. Haw. 1973).....21

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American Heritage Dictionary of the English Language (2d College Ed. 1985).....25

INTRODUCTION

This case was first filed more than seven years ago, yet it is still at the motion to dismiss stage. The court of appeals carefully and thoroughly addressed all the arguments presented in support of petitioners' motion to dismiss and concluded that this case could finally go forward. The court of appeals' opinion correctly applied well-established law to the facts alleged in the Second Amended Complaint. The petition should be denied.

STATEMENT OF THE CASE

Respondents filed this action in July 2006 seeking damages and other relief against federal, state, county and municipal defendants for interfering with and violently disrupting respondents' peaceful political protest, and for violating respondents' constitutional rights to peacefully assemble and to protest in connection with the then-ongoing 2004 presidential campaign. Respondents alleged that they were subjected to unconstitutional discrimination based on their viewpoint – *i.e.*, their opposition to President Bush – when they were removed from the vicinity of the Jacksonville Inn where President Bush was dining on October 14, 2004, by the use of constitutionally excessive force.

After the district court ruled on defendants' motions to dismiss or for summary judgment, the federal defendants (petitioners here) appealed the partial

denial of their motion to dismiss and also sought to appeal the district court's constructive denial of their motion for summary judgment. On review, the Ninth Circuit, relying on the decisions of this Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (decided after argument in the district court on the motions to dismiss the First Amended Complaint) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (decided after argument to the Ninth Circuit), concluded that the First Amended Complaint did not meet the new heightened pleading standard that had been announced in *Twombly* and expanded upon in *Iqbal*. *Moss v. United States Secret Service*, 572 F.3d 962, 971-72 (9th Cir. 2009) (*Moss I*). Because the pleading standard was new, the Ninth Circuit granted respondents leave to replead. *Id.* at 972. Following remand, respondents filed their Second Amended Complaint, alleging additional factual content to demonstrate the plausibility of their claims.

Respondents' Second Amended Complaint asserts claims arising under the First, Fourth and Fifth Amendments as well as under the Oregon Constitution and Oregon common law. For purposes of the petition, however, the only claim at issue is respondents' First Amendment claim for viewpoint discrimination against petitioners Wood and Savage. Petitioners filed a motion to dismiss, which the district court denied in relevant part. Pet. App. 60a. The court of appeals affirmed, *Moss v. United States Secret Service*, 675 F.3d 1213 (9th Cir. 2012), and denied rehearing en banc. 711 F.3d 941 (9th Cir. 2013) (as

amended on denial of rehearing en banc) (*Moss II*), Pet. App. 1a.

STATEMENT OF THE FACTS

The petitioners' Statement of the Facts does not include a complete description of the events at issue as pled in the Second Amended Complaint. Respondents are entitled to have this Court accept the well-pleaded allegations of the Second Amended Complaint and to give respondents the benefit of all inferences reasonably drawn from those factual allegations. "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. at 679. Respondents provide the following statement, focusing on the facts alleged in the Second Amended Complaint that are most relevant to the petition.

1. In October 2004, President Bush was scheduled to make a campaign stop in Jacksonville, Oregon, just weeks before the upcoming presidential election. When they learned of the planned visit, respondents informed the Chief of Police of the City of Jacksonville and the Jackson County Sheriff that they intended to demonstrate in opposition to President Bush and his policies, and indicated that the protest would be multi-generational, with many parents bringing small children. *Id.* at 172a-173a. Neither the Sheriff nor the Chief of Police raised any

objection to the demonstration, but they did advise respondents to stay on the sidewalks and not to obstruct traffic. *Id.* at 173a. Respondents followed those instructions and remained peaceful and law-abiding at all times. *Id.* at 160a, 174a.

At about 5:00 p.m. on October 14th, between two and three hundred anti-Bush protestors, including elderly people, families, children and young infants, gathered in Griffin Park in Jacksonville. *Id.* at 173a. An hour later, the protestors left the park and proceeded to California Street between Third and Fourth Streets, following the route they had pre-cleared with local law enforcement. *Id.* at 174a. They stood in front of the main building of the Jacksonville Inn, approximately two blocks south of the Inn's Honeymoon Cottage where the President planned to stay. *Id.* at 172a, 174a. A similarly-sized group of pro-Bush demonstrators gathered across Third Street. *Id.* at 174a.

Upon learning that the President had changed his plans and intended to dine at the Inn's restaurant rather than the Honeymoon Cottage, pro- and anti-Bush demonstrators clustered on opposite corners at the intersection of Third Street and California Street. *Id.* at 175a. In advance of the President's arrival, petitioners cleared and secured the alleyways adjacent to the Inn. The demonstrators, however, were allowed to remain where they had gathered as the President's motorcade passed through the intersection on its way to the restaurant. *Id.* at 175a-176a. At that point, the pro- and anti-Bush demonstrators were identically situated for all relevant purposes,

"separated only by the 37-foot width of Third Street," *Id.* at 174a.[1]

Once inside the restaurant, the President ate in the patio dining area behind the Inn. *Id.* at 175a, 177a. There is no line of sight to the patio restaurant from the sidewalks on California Street, except immediately adjacent to the alley, *id.* at 176a, and that portion of the sidewalk had already been cleared. *Id.* at 175a-176a. The remainder of the sidewalk on California Street abuts the buildings on that side of the street, blocking any line of sight or access to the patio dining area behind the Inn. *Id.* at 176a. Likewise, from the sidewalk on the south side of California Street across from the Jacksonville Inn there is an even more limited line of sight down the alley to the patio restaurant because of the obstructions caused by the Inn itself, including its exterior stairway into the alley, the six-foot high fence, and the bank on the east side of the alley. *Id.*

A few minutes after the President sat down for dinner, petitioners ordered respondents to move two blocks away where their protest message could not heard by the President during dinner and where their protest signs would not be seen by the President when he departed the restaurant following dinner. *Id.*

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[1] A copy of the map attached as Exhibit A to the Second Amended Complaint showing the two groups in relation to the Inn is included in the appendix to the petition. Pet. App. 59a, 212a.

at 177a-178a. The pro-Bush demonstrators were not moved, *id.*, and the Inn's other diner's and guests were never subject to any security screening. *Id.* at 178a-179a.

2. The Second Amended Complaint also alleges that petitioners' actions in this case were consistent with a longstanding practice of the Secret Service. *Id.* at 181a-182a. It specifically cites a dozen incidents during the first four years of the Bush Administration, including during his re-election campaign and before the events at issue here, where Secret Service agents reportedly engaged in conduct designed to keep critical protesters and their messages away from the President. *Id.* at 189a-194a. It further alleges that the actions of petitioners here were in line with the actual policy and practice of the Secret Service "to work with the White House under President Bush to eliminate dissent and protest from presidential appearances." *Id.* at 184a. The relevant portion of the Advance Manual, cited in the Second Amended Complaint, states as follows:

> **Preparing for demonstrators**
>
> There are several ways the advance person can prepare a site to minimize demonstrators. First, as always, work with the Secret Service and have them ask the local police department to designate a protest area where demonstrators can be placed; preferably not in view of the event site or motorcade route.

Id. at 183a, 218a-219a.

3. Petitioners moved to dismiss the Second Amended Complaint. Adopting the report and recommendation of the magistrate judge, as relevant here, the district court denied petitioners' motion to dismiss respondents' claims for violations of the First Amendment, finding that the Second Amended Complaint "meets the stricter pleading standards imposed by *Twombly* and *Iqbal*" and that petitioners "have not shown, at least at this stage of the litigation, that they are entitled to qualified immunity." Pet. App. 61a; *see id.* at 89a-121a.

4. On appeal, the Ninth Circuit affirmed the district court's ruling, finding respondents' allegations

> that, at the direction of the Secret Service agents, they were moved to a location where they had less opportunity than the pro-Bush demonstrators to communicate their message to the President and those around him, both while the President was dining at the Inn and while he was en route to the Honeymoon Cottage . . . support a plausible claim of viewpoint discrimination.

Id. at 38a. The court of appeals also found that the specific allegations of a dozen similar incidents involving the Secret Service as well as the allegations regarding how respondents' treatment corresponded to the instructions in the Presidential Advance Manual, redacted excerpts of which were attached to and incorporated in the Second Amended Complaint, demonstrated the plausibility of respondents' allegations that petitioners acted with an impermissible

discriminatory motive. As the court of appeals explained:

> The protestors' allegations that the agents' conduct in this case accords with viewpoint discriminatory practices instituted in other, similar, circumstances and encouraged by the President's Advance Manual support the plausibility of the inference that, in this case, the Secret Service agents directed that the anti-Bush protestors be moved because of their viewpoint.
>
> In sum, the anti-Bush protestors have pleaded nonconclusory factual allegations that they were treated differently than the pro-Bush demonstrators; that any security-based explanation for this differential treatment offered by the Secret Service agents was pretextual; and that the agents' directives in this case accord with a pattern of Secret Service action suppressing the speech of those opposed to the President. These allegations, taken together, are sufficient to allow the protestors' claim of viewpoint discrimination to proceed.

Id. at 42a-43a (footnote omitted).

The court of appeals then rejected petitioners' qualified immunity defense, finding that "it is clear that no reasonable agent would think that it was permissible under the First Amendment to direct the police to move protestors farther from the President because of the critical viewpoint they sought to express." *Id.* at 45a; *see ibid.* (finding it "'beyond debate'

that, particularly in a public forum, government officials may not disadvantage speakers based on their viewpoint") (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)).

REASONS FOR DENYING THE WRIT

The petition should be denied because the Ninth Circuit's decision does not involve the creation of any new or novel proposition of law by the court of appeals and does not create a conflict with any decision by another Circuit. Rather, the court of appeals faithfully applied this Court's recent precedents regarding the sufficiency of the allegations of a complaint, and applied well-established law regarding qualified immunity.

I. The Second Amended Complaint sufficiently pleads a claim of viewpoint discrimination in violation of the First Amendment.

In finding that the Second Amended Complaint meets the "plausibility" pleading standard articulated in *Twombly* and *Iqbal*, the court of appeals properly found that the gravamen of respondents' claim is that the petitioners ordered respondents moved from where they were demonstrating, not for the security reasons they offered, but to minimize the President's exposure to the opposition views that respondents were expressing.

As this Court explained in *Iqbal*:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." [*Bell Atlantic Corp. v. Twombly, supra,* 550 U.S.] at 570. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557 (brackets omitted).

556 U.S. at 678.

Respondents satisfied the pleading standard by providing factual detail and context regarding the events of the evening of October 14, 2004. The Second Amended Complaint specifically alleges facts demonstrating that (1) respondents were treated differently than similarly situated pro-Bush demonstrators and (2) the differential treatment was the result of intentional viewpoint discrimination. These are not conclusory allegations. Rather, they are supported by detailed factual assertions regarding the differential treatment respondents received, and demonstrating how the security rationale proffered by petitioners, is

undermined by their treatment of the pro-Bush demonstrators as well as the diners and other visitors at the Inn.

Furthermore, in paragraphs 82(a) to (*l*) of the Second Amended Complaint, respondents allege in detail twelve other instances during the first term of the Bush administration where the Secret Service engaged in conduct designed to keep critical protesters and their messages away from the President, and describe how the actions of petitioners here were in line with those other instances and in line with White House strategy as expressed in the Presidential Advance Manual to limit the President's exposure to dissenting views. *Id.* at 183a-184a, 189a-194a. As the court of appeals found, those allegations further support the plausibility of respondents' claim that petitioners' actions in this case reflected a decision to shield the President from respondents' unwelcome message while he was dining, rather than any legitimate security concern. *Id.* at 42a.

If petitioners' view were accepted, no plaintiff asserting a claim for viewpoint discrimination could survive a motion to dismiss unless the plaintiff could allege that the defendant announced his or her intention to discriminate on the basis of the plaintiff's viewpoint. Neither *Iqbal* nor *Twombly* requires such a result. Respondents' allegations provide a more than sufficient basis to support a claim of intentional viewpoint discrimination.

A. Respondents were treated differently than the similarly situated pro-Bush demonstrators.

The allegations of the Second Amended Complaint demonstrate that respondents were for all intents and purposes similarly situated to the pro-Bush demonstrators on October 14, 2004, but only respondents were forcibly moved to a location more than twice as far from the Inn.

Specifically, before the Secret Service directed the removal of the respondents, the two groups of demonstrators were not even one block apart; they were all on California Street, "separated only by the 37-foot width of Third Street." *Id.* at 174a. Moreover, because the California Street buildings blocked the Jacksonville Inn's rear-patio from both the pro- and anti-Bush demonstrators on California Street, none of them had access or a line of sight to the patio or the President. *Id.* at 176a, 212a.

Indeed, the westernmost portion of the pro-Bush demonstrators and the easternmost portion of anti-Bush demonstrators were effectively identically situated for security purposes; both groups were at the corner of Third and California Streets. The individuals on both sides of Third Street were in positions of greater proximity to the President than all other members of their respective groups. *Id.* at 212a. They were within a few feet of the President's limousine as it passed that corner when the President was arriving at the Inn, and again would be within a few feet of his

limousine on the President's departure from the Inn en route to the Honeymoon Cottage where he was spending the night. *Id.* at 175a, 179a, 188a, 212a.

After respondents were moved beyond Fourth Street to east of Fifth Street, nearly two blocks away from the Inn, respondents were significantly farther from the President than the pro-Bush demonstrators. *Id.* at 177a. At their new site, respondents could not be heard or heard as well by the President while he was dining and could not be seen by the President when his motorcade left the Inn. Pet. App. 177a, 178a, 212a; *see also Moss II*, Pet. App. 37a ("it is a plausible inference from the facts alleged that the protestors' chants would be less intelligible from two blocks away").

B. The differential treatment was the result of intentional viewpoint discrimination; it was not the result of petitioners' pretextual security rationale.

Petitioners' principal response is that the allegations of viewpoint discrimination are not plausible given their assertion that their actions were motivated by legitimate security concerns. After reviewing the record, however, the court of appeals properly found that it was petitioners' explanation that strained credulity, accepting, as it was required to do, the factual allegations in the Second Amended complaint.

Specifically, the security rationale offered by the petitioners for the decision to move the anti-Bush

protestors is belied by their treatment of both the pro-Bush supporters and the diners and other visitors at the Inn. If preventing people from being within handgun or explosive range of the President "[h]ad been the true reason for the . . . [order to move the respondents], the Defendant Secret Service agents would have requested or directed that the pro-Bush demonstrators at the corner of Third and California be moved further to the west so that they would not be in range of the President as he travelled from the Inn to the Honeymoon Cottage." *Id.* at 178a. "Instead, the Defendant Secret Service Agents left the pro-Bush demonstrators" at Third and California "to cheer for President Bush. . . . while the anti-Bush demonstrators . . . [were] violently moved two blocks east, well out of the President's view." *Id.*

Moreover, that respondents were on the east side of the 37-foot separation between the groups did not make respondents a greater security risk; it was irrelevant for the professed security purpose, because neither assemblage was in handgun or explosive range of the President while he was dining at the Inn. *Id.* at 176a. These concrete facts undermine the security rationale offered by petitioners, and strongly suggest (at the very least) that the real reason for moving respondents was to prevent or diminish the expression of their opposition views within the President's sight and hearing. *Id.* at 178a-179a.

At best, petitioners have raised a factual dispute that should not be decided on a motion to dismiss and is not properly appealable under the collateral order

doctrine. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995).

C. Petitioners' treatment of the diners, guests, and other visitors at the Inn also undermines their asserted security rationale.

The Second Amended Complaint also alleges facts explaining why the petitioners' failure to screen or remove the guests and diners inside the Inn further supports respondents' allegation that suppression of opposition views was the true reason respondents were moved. *Id.* at 177a, 178a. As the Eighth Circuit has noted, prohibiting expressive activity "while at the same time allowing conduct completely unrelated to the First Amendment, yet equally annoying [or equally threatening to security], to continue unabated . . . stands the First Amendment on its head." *Pursley v. City of Fayetteville*, 820 F.2d 951, 956 (8th Cir. 1987).

As the district court found,

> The threat to the President's security here, as implied by the security rationale, came simply from the *proximity* of persons to the President. . . . The[ ] proximity [of the diners and guests] to the President makes them a part of the security problem, political views notwithstanding. They received different and, arguably, better treatment than the anti-Bush demonstrators as shown by the

> fact that they were neither relocated nor screened.
>
> That the diners and guests were not expressing a political view is immaterial to the fact that their proximity made them a potential threat to the President's safety.

Pet. App. 112a-113a.

The fact that those inside the Inn were not in a public area exercising First Amendment rights made them *more*, not *less*, susceptible to legitimate security restrictions. And surely they posed a greater risk of assaulting the President with a handgun or explosive – or even with a thrown steak knife or wine bottle – than the anti-Bush demonstrators outside the Inn, separated from and blocked from even seeing the President by the Inn itself, the other buildings on California Street, and the six foot tall fence surrounding the dining patio. *Id.* at 176a. "'Freedom of expression . . . would rest on a soft foundation indeed if government could distinguish' between demonstrators and pedestrians on 'a wholesale and categorical basis,' without providing evidence that demonstrators pose a greater risk to identified government interests than do pedestrians." *Lederman v. United States*, 291 F.3d 36, 45 (D.C. Cir. 2002) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 101 (1972)) (ellipsis by the court of appeals).

The differing treatment of the anti-Bush protestors from the President's supporters and the diners and guests at the Inn shows – not just plausibly, but

persuasively – that the petitioners' "handgun and explosive range" security rationale was false. The demonstrators were entirely peaceful; the local police were fully in control of the situation; there was no unrest or emergency situation. The court of appeals and district court correctly concluded that the security rationale did not justify the differential treatment of respondents and that respondents had plausibly stated a claim for viewpoint discrimination.[2]

II. The court of appeals correctly held that petitioners are not entitled to qualified immunity.

Petitioners contend that the Ninth Circuit erred in analyzing the issue of qualified immunity at too high a level of generality. Petitioners are incorrect. Their argument is premised on their factual assertion – contrary to the allegations of the Second Amended Complaint – that they did not treat respondents differently (or differently enough) based on the viewpoint of their speech. Such factual disputes are not appropriate for resolution on a motion to dismiss (or even a motion for summary judgment). *See Johnson v. Jones*, *supra*, 515 U.S. at 313-15 (1995) (limiting interlocutory appellate review of qualified immunity

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[2] The facts alleged in the Second Amended Complaint also state plausible claims for content discrimination and discrimination against expression in violation of the First Amendment. (*Id.* at 185a-186a). Neither the district court nor the court of appeals addressed these claims directly in their decisions.

decisions to questions of law, not evidence sufficiency).

A. The First Amendment's requirement of viewpoint neutrality is well-established and undisputed.

"Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828 (1995). The Second Amended Complaint alleges that the petitioners targeted respondents because of their views and the content of their speech. Any reasonable official in petitioners' positions would know that discriminating against individuals based on the viewpoint they are expressing is unconstitutional.

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Id. at 828-29 (citations omitted). *See also Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642-43

(1994) (discrimination based on viewpoint violates the First Amendment); *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) (same); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (same); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) (same).

The proposition that discriminating against respondents because of their views violates the First Amendment "should be and is obvious to everyone," including petitioners. *Metro Display Adver., Inc. v. City of Victorville*, 143 F.3d 1191, 1196 (9th Cir. 1998) (rejecting the city officials' argument that the unconstitutionality of viewpoint discrimination was not clearly established). Petitioners do not dispute that the principle of viewpoint neutrality is well-established.

B. Secret Service agents are not exempt from the First Amendment.

The principle of viewpoint neutrality applies to Secret Service agents as well as other government officials. More than 35 years ago, the D.C. Circuit noted: "The congressional grants of authority to the Secret Service to protect the President, and to control access to temporary presidential residences, cannot be said to authorize procedures or actions violative of the Constitution." *Sherrill v. Knight*, 569 F.2d 124, 128 n.14 (D.C. Cir. 1977) (internal citations omitted). Citing *A Quaker Action Group v. Hickel*, 421 F.2d 1111 (D.C. Cir. 1969), the *Sherrill* court went on to "reassert our conclusion in that case that we cannot

agree with the Government's argument that mere mention of the President's safety must be allowed to trump any First Amendment issue." *Sherrill*, 569 F.2d at 128. The *Sherrill* court's statement was as true at the time of the events at issue here as it was in 1977.

Petitioners cite Justice Ginsburg's concurring opinion in *Reichle v. Howards*, 132 S.Ct. 2088, 2097 (2012), for the proposition that Secret Service agents "rightly take into account words spoken to, or in close proximity of, the person whose safety is their charge" in evaluating security threats. *Reichle*, however, is a very different case than this one. In *Reichle*, the defendant was arrested after making physical contact with Vice President Cheney at a shopping mall. Here, respondents were never anywhere near President Bush. Even before they were moved, there were buildings between respondents and the President, and they never engaged in any conduct that might be regarded as threatening. Nothing in *Reichle* suggests that, in the absence of a true or even potential threat, the defendant in that case could have been physically restrained on the basis of his words alone.

To the contrary, the law is clear that government agents may not override the First Amendment merely to shield the President or Vice-President from dissent at public events. Courts have been vigilant in condemning such conduct as unconstitutional.

For example, in 1971, President Nixon attended a public function in North Carolina. Certain federal

and local officials excluded anti-war demonstrators from the event because of their critical signs and leaflets. When the protestors filed suit, the district court had no difficulty finding in their favor, calling the defendants' viewpoint-based exclusion a "wholesale assault" on the "right to freedom of assembly and right to petition for redress of grievances." *Sparrow v. Goodman*, 361 F. Supp. 566, 585 (W.D.N.C. 1973), *aff'd sub nom.*, *Rowley v. McMillan*, 502 F.2d 1326 (4th Cir. 1974).

Likewise, in 1972, government officials in Hawaii detained and excluded from a public welcoming ceremony for President Nixon several individuals with signs expressing their opposition to his policies. The court held that the breach of First Amendment rights was so clear as to defeat a motion to dismiss based on immunity. *Butler v. United States*, 365 F. Supp. 1035 (D. Haw. 1973).

When Vice President George H. W. Bush attended a public ceremony at Independence Hall celebrating the 200th anniversary of the Constitution, people carrying "non-controversial" signs and banners were welcomed, but anyone with a controversial message was excluded. The district court determined that the federal defendants had violated the Constitution because "[National] Park Service personnel sought to prevent respondents from expressing their dissenting views in any manner that might come to the attention of persons attending the Vice-President's speech, and which might detract from the mainstream patriotism" of the event. *Pledge of Resistance v. We The*

People 200, Inc., 665 F. Supp. 414, 417, 419 (E.D. Pa. 1987).

More recently, in *Mahoney v. Babbitt*, 105 F.3d 1452 (D.C. Cir. 1997), the D.C. Circuit reversed the district court's Order allowing the National Park Service to bar demonstrators critical of President Clinton's position on abortion rights from his Inaugural Parade route. The court noted that "[n]o case called to our attention says that anyone has ever successfully established the power of a government to so suppress opposing viewpoints; indeed, in few cases has the government of the United States even tried." *Id.* at 1456-57. The D.C. Circuit concluded: "In short, all constitutional authority supports the position we would have thought unremarkable, that a government entity may not exclude from a public forum persons who wish to engage in First Amendment protected activity solely because the government actor fears, dislikes, or disagrees with the opinions of those citizens." *Id.* at 1459; *see also Johnson v. Bax*, 63 F.3d 154, 157-58 (2d Cir. 1995) (protester carrying sign addressed to President Clinton stated cause of action when he was arrested for refusing to move to an anti-Clinton area designated by police); *Grady v. El Paso Community College*, 979 F.2d 1111, 1114 (5th Cir. 1992) (defendants should have known that speech criticizing the Persian Gulf War was protected).

In short, the district court and court of appeals' decisions here are just the most recent example in a long line of cases that condemn federal officials' disregard of the First Amendment to shield the

President or Vice-President from dissent at public events. "The First Amendment is not a problem. It is a solution to a problem. The problem is government officials trying to abridge the liberty of private individuals to say what they like." *Metro Display*, 143 F.3d at 1195. The Ninth Circuit followed well-established law in denying petitioners' claim to qualified immunity as a matter of law.

C. Petitioners' argument about the level of generality of the court of appeals' decision is simply a reformulation of their improper attempt to dispute the factual allegations of the Second Amended Complaint.

The argument that the court of appeals resolved the issue of qualified immunity at too high a level of generality is nothing more than a restated quarrel with the factual allegations in the Second Amended Complaint. Those allegations describe with particularity the manner in which anti-Bush protestors were treated differently than pro-Bush demonstrators. Petitioners' attempt to redefine the question by asking whether "it was clearly established that moving one group to a location one block further from the President than another when creating a presidential security perimeter constituted a violation of that group's First Amendment rights?" That is a description of the facts but not a description of the relevant legal principle. And, it is such a remarkably narrow statement of the principle that only a decision in a

case involving an identical fact situation could overcome qualified immunity.

As the court of appeals noted, petitioners "inaccurately characterize[d] both the protestors' allegations and the governing law." Pet. App. 44a. The court of appeals concluded that petitioners had, among other things, improperly restated respondents' factual allegations about the distances between the protestors; ignored "the allegation that the pro-Bush demonstrators were permitted to remain along the President's motorcade route, while the anti-Bush protestors were kept away"; and, fundamentally, ignored the fact that "the protestors' claim is not simply that they were moved, but that they were relocated because they criticized the President." *Id.* at 44a-45a (emphasis in original). Petitioners repeat that same mistake in their petition to this Court.

D. A case with identical facts is not required to survive a qualified immunity defense where, as here, the application of a well-established legal principle to the facts alleged in the complaint is unmistakably clear.

The government's contention that no court had ever previously held that the Secret Service is required to ensure that "groups of differing viewpoints [are] positioned in locations exactly equidistant from the President at all times" misses the point. The issue in this case is whether the Secret Service can treat different groups differently because of their viewpoint.

As the court of appeals correctly held, the application of that well-established legal principle to the facts alleged in the Second Amended Complaint was clear, and the absence of another case with identical facts therefore does not entitle petitioners to qualified immunity:

> [T]he denial of qualified immunity does "not require a case directly on point." *Ashcroft v. al-Kidd*, ___ U.S. ___, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011). Rather, it requires that "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* It is "beyond debate" that, particularly in a public forum, government officials may not disadvantage speakers based on their viewpoint.

Pet. App. 45a; *see Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("the salient question" of a motion for qualified immunity is not whether there is another case with "fundamentally similar" facts, but "whether the state of the law" gave defendants "fair warning" that their actions were unconstitutional).

When this Court in *Rosenberger, supra*, 515 U.S. at 828, said it was "axiomatic" that the government could not regulate speech based upon the message it conveys, its choice of the word "axiomatic" disposed of arguments such as the one made by petitioners here. The word "axiomatic" in this context means a self-evident or universally recognized truth. American Heritage Dictionary of the English Language (2d College Ed. 1985). That is to say, the proposition should be and is obvious to everyone. Even in a nonpublic

forum, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788 (1985). And that is exactly what the well-pled facts of the Second Amended Complaint plausibly allege the petitioners did here.

Petitioners' argument that there was no clearly established law requiring them to move respondents back to the motorcade route prior to the President's departure from the Inn is another distortion of the record and a complete red herring. Respondents do not claim that they should have been returned to their former position; rather, they contend that they should never have been moved in the first place because the decision to move them was based on the viewpoint they were expressing, not the false security rationale offered by petitioners.

E. There is no circuit conflict here.

Petitioners suggest that there is a conflict between the Ninth Circuit's decision below and the Tenth Circuit's decision in *Pahls v. Thomas*, 718 F.3d 1210 (10th Cir. 2013). Although *Pahls* involves presidential security and claims of viewpoint discrimination, the similarities are superficial. *Pahls* rests on very different facts and is easily distinguishable from the present case.

In *Pahls*, in anticipation of an announced visit by President George W. Bush at a fundraiser for former

Senator Pete Domenici at the private home of the mayor of the village of Los Ranchos de Albuquerque, a group of anti-Bush protestors sought to demonstrate along the President's motorcade route. Local police, however, had directed the anti-Bush protestors to an area on the public right of way that was 150 feet away from the President's planned route. At the same time, a Secret Service Agent had allowed supporters of President Bush to remain on private property closer to the President's route. But that Agent was not involved in the decision about where to locate the anti-Bush protestors and thus could not be held responsible for the actions of the local police in keeping the protestors away from the President. *Id.* at 1233. And the local police officers could not be liable for the Secret Service Agent's decision not to move the President's supporters who were on private property. *Id.*

By contrast, petitioners here personally violated respondents' constitutional rights by expressly directing the removal of the protestors, and only the protestors, when their message could be heard by the President and his party in the dining area. It was petitioners' decision to move the protestors *and* it was petitioners' decision to leave the President's supporters and the other unscreened guests and diners in place and within handgun and explosive range of the President. These facts persuasively demonstrate that respondents' message, not their proximity to the President, was the reason they were moved to a

location significantly further from the President than where his supporters were permitted to remain.

F. The court of appeals (and the district court) did not improperly second-guess any split-second security determination by the Secret Service agents.

This case does not involve the courts or respondents second-guessing any split-second security determination by petitioners. There is no allegation in this case that petitioners made mistaken split-second judgments in a good-faith attempt to carry out their duties. Rather, as alleged in the Second Amended Complaint, the facts of this case reflect a pattern of behavior rather than the sort of split-second judgments that are entitled to deference from this Court. Respondents specifically allege that petitioners made a considered, deliberate choice, based on policy and practice, to treat groups of demonstrators differently based on the content of their messages.

As the court of appeals properly concluded:

> In sum, the anti-Bush protestors have pleaded nonconclusory factual allegations that they were treated differently than the pro-Bush demonstrators; that any security-based explanation for this differential treatment offered by the Secret Service agents was pretextual; and that the agents' directives in this case accord with a pattern of Secret Service action suppressing the speech of those opposed to the President. These

> allegations, taken together, are sufficient to allow the protestors' claim of viewpoint discrimination to proceed.

Pet. App. 43a.

By suggesting that this case is about second-guessing the Agents' security determinations, petitioners are again attempting to substitute their version of the facts for the facts alleged in the Second Amended Complaint. Because this case involves an appeal from the denial of a motion to dismiss, all facts and reasonable inferences must be viewed in the light most favorable to respondents. It is inappropriate for petitioners to attempt to rewrite or recharacterize respondents' factual allegations, or to argue that the evidence will support a different version of events at trial.

The district court and court of appeals were faced with the purely legal question whether respondents' allegations stated a claim sufficient to survive a defense of qualified immunity. At this stage, "[a]n appellate court reviewing the denial of a defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts." *Johnson v. Jones*, *supra*, 515 U.S. at 313 (1995) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)). In affirming the denial of petitioners' motion to dismiss, the court of appeals applied the proper standards to the allegations in the Second Amended Complaint.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

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REPLY BRIEF

RECORD
AND
BRIEFS

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No. 13-115

In the Supreme Court of the United States

TIM WOOD AND ROB SAVAGE, PETITIONERS

v.

MICHAEL MOSS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondents seek compensatory and punitive damages from two Secret Service agents who, while protecting President George W. Bush, allegedly required that a group of 200 to 300 anti-Bush demonstrators be moved away from an alley next to an outdoor patio where the President was making a last-minute, unscheduled stop to dine, thus causing the group to be less than one block farther away from the alley than a group of pro-Bush demonstrators who were not adjacent to the alley at the outset. The court of appeals held that petitioners are not entitled to qualified immunity from respondents' claim under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), of viewpoint discrimination in violation of the First Amendment. Pet. App. 31a-50a. Eight judges who dissented from the denial of rehearing en banc recognized that the decision is "a textbook case-study of judicial second-guessing of the on-the-spot judgment that Secret Service agents * * *

made about security needs." *Id.* at 8a. The dissenters also explained that the decision "commits many familiar qualified immunity errors," and they expressed understandable "concern[]" that this case would extend the Ninth Circuit's "storied losing streak" in qualified-immunity cases. *Id.* at 22a. Respondents' brief opposing certiorari does not alleviate those concerns. In light of the particular threats that the decision below poses to the sensitive and important work of the Secret Service in protecting high-level officials, this Court should grant plenary review or summarily reverse.

A. The Court Of Appeals Defined The Right Against Viewpoint Discrimination At A High Level Of Generality, Without Accounting For The Context

This Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality" in conducting qualified-immunity analysis. *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (citation omitted); see Pet. 14-15 (citing five additional cases between 1987 and 2012). Yet the decision below repeated that all-too-common mistake. It defined the right at issue as the right to be free of "viewpoint discrimination in a public forum," Pet. App. 49a—an abstract proposition that is of no more "help in determining whether the violative nature of particular conduct is clearly established" than the truism that "an unreasonable search or seizure violates the Fourth Amendment." *Al-Kidd*, 131 S. Ct. at 2084. The court should, instead, have considered whether it would have been "clear to a reasonable officer that his conduct was unlawful *in the situation he confronted.*" *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (emphasis added).

1. The court of appeals held that respondents have advanced a plausible claim of "facial viewpoint discrimina-

tion" simply because "the anti-Bush protestors * * * were moved to a location where they had less opportunity than the pro-Bush demonstrators to communicate their message to the President." Pet. App. 38a. Yet, as the petition explained (at 16-20), the general rule against "viewpoint discrimination" does not *clearly establish* that the relatively trivial disparate impact in this case violated the First Amendment.

In framing their discussion, respondents characterize the anti-Bush group as having been "similarly situated" (Br. in Opp. 10, 12) with the pro-Bush group, which is demonstrably inconsistent with their own allegations. Respondents conspicuously choose to focus on the two groups' relative distance from *the motorcade route* down Third Street. *Id.* at 12-13. But respondents allege that the demonstrators were not moved until after the motorcade had arrived. *Id.* at 4; Pet. App. 175a-177a. By that time, the relevant point of reference was no longer Third Street but the outdoor patio where the President was dining. As the petition demonstrated (on the basis of respondents' own map), the anti-Bush group was closer to, and less screened from, the patio than was the pro-Bush group—and that was true both while the anti-Bush group was between Third and Fourth Streets and after it had been moved across Fourth Street. Pet. 17 & n.4; Pet. App. 212a.[1] Respondents have not even attempted to

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[1] Respondents are equivocal about the court of appeals' repeated reliance (Pet. App. 37a-38a, 44a, 47a, 48a) on the effect that the dinner-time move had on their distance from the President's post-dinner motorcade route. At one point, they assert that they "do not claim that they should have been returned" to the side of Third Street before the motorcade left the Inn. Br. in Opp. 26. Elsewhere, however, respondents accuse petitioners of ignoring the allegation that "the anti-Bush protestors were *kept away*" from the motorcade route. *Id.* at 24 (quoting Pet. App. 44a) (emphasis added).

rebut that demonstration, which is fatal to their claim to have been similarly situated.

Respondents also exaggerate the purported effect of the move, contending that, at their new location, the anti-Bush "protest message could not [be] heard by the President during dinner." Br. in Opp. 5; see *id.* at i (their "message could neither be seen nor heard"). Again, their allegations do not support that statement. Indeed, as explained in the petition, the court of appeals' first decision expressly found that respondents' First Amended Complaint failed to allege they had been "moved to an area where the President could not hear their demonstration," and respondents did not remedy that deficiency in the now-operative Second Amended Complaint. Pet. 18 n.5 (quoting *Moss* v. *United States Secret Serv.*, 572 F.3d 962, 971 (9th Cir. 2009)); see Pet. App. 177a-179a. Even the decision below did not credit the proposition that the anti-Bush group was moved beyond the President's earshot. Instead, the court of appeals went beyond respondents' allegations to "infer" that the anti-Bush group had been rendered "less able to communicate effectively with the President." *Id.* at 37a.

2. The court of appeals identified no case suggesting, much less clearly establishing, as of 2004, that actionable viewpoint discrimination inheres in causing a group with one view to be less than one block farther away from the President than a group with an opposing view that is itself nearly a block away. Pet. 17-18 & n.5. Respondents cite (Br. in Opp. 15-16, 19, 21-22) cases that involved prohibiting expressive activity altogether in an area[2] or entirely

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[2] *Lederman* v. *United States*, 291 F.3d 36, 39, 46 (D.C. Cir. 2002) (ban on demonstrations on certain sidewalks near the Capitol building); *Pursley* v. *City of Fayetteville*, 820 F.2d 951, 952 (8th Cir. 1987)

excluding persons of one view from an event.[3] But respondents identify no instances where the First Amendment was held to have been violated when security considerations merely caused two groups of different views to end up at marginally different distances from a public official (especially when the groups were not even similarly situated at the outset).[4]

3. Ultimately, respondents' brief in opposition never squarely embraces the court of appeals' facial-viewpoint-discrimination holding, which remains in serious tension with the Tenth Circuit's conclusion that "[t]he First Amendment does not impose upon public officials an af-

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(ban on all pickets and demonstrations in front of residences or dwelling places).

[3] *Metro Display Adver., Inc.* v. *City of Victorville*, 143 F.3d 1191, 1194 (9th Cir. 1998) (attempt to ban pro-union displays in bus shelters); *Mahoney* v. *Babbitt*, 105 F.3d 1452, 1455-1456 (D.C. Cir. 1997) (concededly viewpoint-based decisions to deny permits to certain demonstrators who wished to protest along Inaugural Parade route); *Pledge of Resistance* v. *We the People 200, Inc.*, 665 F. Supp. 414, 415-417 (E.D. Pa. 1987) (attempt to ban peaceful demonstration activities by anti-war protestors and civil rights groups in areas of bicentennial festivities in Philadelphia); *Butler* v. *United States*, 365 F. Supp. 1035, 1037-1038 (D. Haw. 1973) (removal or exclusion of protestors from Air Force base during event to greet President Nixon and Japanese premier); *Sparrow* v. *Goodman*, 361 F. Supp. 566, 583-584 (W.D.N.C. 1973) (exclusion of various likely protestors from event in the Charlotte Coliseum), aff'd *sub nom. Rowley* v. *McMillan*, 502 F.2d 1326 (4th Cir. 1974).

[4] Respondents cite (Br. in Opp. 22) one case that involved the arrest of a protestor who tried to carry a sign outside of a designated "pro" or "anti" demonstration zone in close proximity to a presidential speech. See *Johnson* v. *Bax*, 63 F.3d 154, 156 (2d Cir. 1995). The court there, however, did not address the viability of the plaintiff's First Amendment claim, ruling only that the district court had erroneously treated the complaint as alleging false-arrest and false-imprisonment, but not First Amendment, claims. *Id.* at 157-159.

firmative duty to ensure a balanced presentation of competing viewpoints." *Pahls* v. *Thomas*, 718 F.3d 1210, 1239 (2013). Instead, respondents rely repeatedly on the premise that they were treated "differently *because of* their viewpoint." Br. in Opp. 24 (emphasis added); see *id.* at 9, 10, 11, 13, 22-23, 26, 27-28, 28. As discussed below, however, that premise is unavailable to them, because their allegations are insufficient to support the needed inference that the Secret Service agents here acted with any discriminatory purpose.

B. Respondents Have Not Adequately Pleaded The Discriminatory Motive Necessary For A Claim Of Intentional Viewpoint Discrimination

As the petition explained (at 21-28), respondents' conclusory allegations of discriminatory motive are insufficient to satisfy this Court's application of basic pleading standards in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007). Respondents still point to nothing that would make their inference of unconstitutional motive other than "merely consistent with" the facts they allege. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557, 570).

1. Respondents contend that discriminatory intent is "persuasively demonstrate[d]" by "petitioners' decision to leave the President's supporters and the other unscreened guests and diners in place and within handgun and explosive range of the President." Br. in Opp. 27; see *id.* at 16-17. But the decisions to allow those other groups (*i.e.*, the pro-Bush group and the guests and diners already at the Inn) to remain in place are clearly susceptible to "more likely explanations" (*Iqbal*, 556 U.S. at 681) than invidious discrimination, especially when those decisions were made against the backdrop of a last-minute change in the President's plans. A large group of 200 to

300 people near the outdoor patio where the President was dining presented different security concerns than did the presence of a group (like the pro-Bush demonstrators) along the street where the President's motorcade would travel. And the other diners and guests were at the Inn before it was known that the President would dine there, and they were fewer in number than the crowd that had gathered in anticipation of seeing the President, which could—regardless of its political leanings or its apparently "peaceful" nature (Br. in Opp. 17)—provide cover for someone planning to do the President harm. See Pet. 22-23. The different treatment of those differently situated groups as the President's plans evolved provides no indication that the agents' asserted security-based rationale was pretextual or inconsistently applied.

2. Respondents also contend that their inference of discriminatory motive is "consistent with" or "in line with" their assumption that a Presidential Advance Manual and "twelve other instances during the first term of the Bush administration" demonstrate an unwritten Secret Service policy of "limit[ing] the President's exposure to dissenting views." Br. in Opp. 6, 11. Of course, as explained in the petition (Pet. 23-24) and by the eight dissenting judges below (Pet. App. 13a-15a), the manual and other alleged incidents do not involve similar circumstances (or the same agents) and do not show that there is any unwritten policy of discrimination. Moreover, even assuming there were other incidents involving viewpoint discrimination, respondents' contention that the conduct here was "consistent with" or "in line with" (Br. in Opp. 6, 11) such incidents could not suffice to allege illegal conduct under *Iqbal* and *Twombly*. See *Iqbal*, 556 U.S. at 678 ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the

line between possibility and plausibility of entitlement to relief.'") (quoting *Twombly*, 550 U.S. at 557) (some internal quotation marks omitted).[5]

3. Respondents also suggest (Br. in Opp. 11) that, in petitioners' view, "no plaintiff asserting a claim of viewpoint discrimination could survive a motion to dismiss unless the plaintiff could allege that the defendant announced his or her intention to discriminate." That is simply incorrect. Petitioners merely contend that a plaintiff must provide "specific, nonconclusory factual allegations" giving rise to a sound inference of unlawful motive. Pet. 27 (quoting *Crawford-El* v. *Britton*, 523 U.S. 574, 598 (1998)). Here, for instance, respondents' allegation might have been plausible if local law-enforcement officers had said that the Secret Service agents invoked a discriminatory reason for moving the anti-Bush group (rather than the viewpoint-neutral justification they gave (Pet. 21-22)); or if the pro-Bush group had then been allowed to move into the nearer location that the anti-Bush group had vacated; or, perhaps, if the other incidents had involved the same agents and were similar in nature to the events here (as opposed to being primarily at ticketed events).

Respondents, however, have made no such specific allegations. Permitting their complaint to go forward will only make it even more difficult for defendants in the Ninth Circuit to defeat claims involving allegations of illegal motive at the motion-to-dismiss stage, notwith-

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[5] Respondents repeatedly suggest (Br. in Opp. 14-15, 17, 29) that petitioners attempt to raise a factual dispute that cannot be resolved on a motion to dismiss. But *Iqbal* disposed of a similar objection, explaining that "[e]valuating the sufficiency of a complaint is not a 'fact-based' question of law" and does not "implicate[]" the problem addressed in *Johnson* v. *Jones*, 515 U.S. 304 (1995). *Iqbal*, 556 U.S. at 674-675.

standing this Court's "repeated[]" emphasis on "the importance of resolving immunity questions at the earliest possible stage in litigation." *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009) (citation omitted); see *Iqbal*, 556 U.S. at 685 ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'") (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)).

C. The Decision Below Poses Threats To The Work Of The Secret Service And Warrants Review Or Summary Reversal

As explained in the petition (at 29-31), the decision below is not limited to the Secret Service context, but it poses particularly great risks to the Secret Service's work, which often requires agents to make on-the-spot decisions to safeguard the President (or other officials) in the presence of large groups of people and changing circumstances. Respondents say (Br. in Opp. 28) that the facts of this case involve "a considered, deliberate choice" rather than the "second-guessing [of] any split-second security determination by petitioners." But the agents were reacting to the President's last-minute decision to dine at the Inn, which dramatically changed the significance of the fact that there were already 200 to 300 people crowding that block. It cannot be the case, as respondents contend, that the agents' only constitutionally compliant options at that point were to "prevail[] upon the President not to dine at the Inn" or—in order to create a predicate for moving the crowd—to take additional steps to interfere with even more speech than security concerns would require in an attempt to keep opposing groups at roughly equal distances from the President. Pet. 30 & n.8

(quoting recording of oral argument in the court of appeals).

Secret Service agents work throughout the Nation, and they should not, while in the Ninth Circuit, be distracted from their important security-related assessments by the threat of personal liability if they fail to ensure comparable proximity to public officials for various groups seeking to express competing views. See Pet. App. 22a-23a (O'Scannlain, J., dissenting from the denial of rehearing en banc) ("[T]his decision hamstrings Secret Service agents, who must now choose between ensuring the safety of the President and subjecting themselves to First Amendment liability.").

This Court has previously acknowledged that qualified immunity plays an especially critical role in ensuring that Secret Service agents do not "'err always on the side of caution' because they fear being sued." *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Davis* v. *Scherer*, 468 U.S. 183, 196 (1984)). In *Hunter*, the Court summarily reversed a Ninth Circuit decision that had erroneously denied qualified immunity to Secret Service agents. See *id.* at 227-229. Even outside the Secret Service context, the Court has repeatedly (and sometimes summarily) reversed the Ninth Circuit for denying qualified immunity based on rules of constitutional law "cast at a high level of generality." *Brosseau* v. *Haugen*, 543 U.S. 194, 199 (2004) (per curiam); see *al-Kidd*, 131 S. Ct. at 2084 ("We have repeatedly told * * * the Ninth Circuit in particular * * * not to define clearly established law at a high level of generality."); *Saucier*, 533 U.S. at 200. And just last year, the Court reiterated the point in another Secret Service case (arising in the Tenth Circuit). *Reichle* v. *Howards*, 132 S. Ct. 2088, 2094 (2012).

Under the circumstances of this case, the Court should not "let such a mistake stand with respect to those who guard the life of the President." *Hunter*, 502 U.S. at 229 (Scalia, J., concurring in the judgment). It should either grant plenary review or summarily reverse the decision below. If the Court chose the latter course, it would not need to "express any view" about the constitutionality of petitioners' alleged conduct; it could simply recognize that—as demonstrated by the dissent of eight judges—the purported illegality was not sufficiently "beyond debate" to render the agents "plainly incompetent." *Stanton* v. *Sims*, No. 12-1217 (Nov. 4, 2013) (per curiam), slip op. 8 (citations omitted).

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted. The Court may also wish to consider summary reversal of the court of appeals' judgment.

Respectfully submitted.

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NOVEMBER 2013

PETITIONER'S BRIEF

No. 13-115

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v.

MICHAEL MOSS, ET AL.

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QUESTIONS PRESENTED

Petitioners are Secret Service agents who, while protecting President George W. Bush, are alleged to have required that a group of 200 to 300 anti-Bush demonstrators be moved away from an alley next to an outdoor patio where the President was making a last-minute, unscheduled stop to dine. After they were moved, the anti-Bush demonstrators were less than one block farther from the alley than a group of pro-Bush demonstrators (who had not been adjacent to the alley at the outset). They were also two blocks farther from the route that the President's motorcade subsequently took when he left the restaurant. The court of appeals held that petitioners are not entitled to qualified immunity from a claim under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), of viewpoint discrimination in violation of the First Amendment. The questions presented are as follows:

1. Whether the court of appeals erred in denying qualified immunity to Secret Service agents protecting the President by evaluating the claim of viewpoint discrimination at a high level of generality and concluding that pro- and anti-Bush demonstrators needed to be positioned an equal distance from the President while he was dining on the outdoor patio and then while he was traveling by motorcade.

2. Whether respondents have adequately pleaded viewpoint discrimination in violation of the First Amendment when no factual allegations support their claim of discriminatory motive and there was an obvious security-based rationale for moving the nearby anti-Bush group and not the farther-away pro-Bush group.

PARTIES TO THE PROCEEDING

Defendants-appellants in the court of appeals were petitioner Tim Wood, United States Secret Service agent, in his official and individual capacities; petitioner Rob Savage, United States Secret Service agent, in his official and individual capacities; Ron Ruecker, Superintendent of the Oregon State Police, in his official and individual capacities, Eric Rodriquez, former Captain of the Southwest Regional Headquarters of the Oregon State Police, in his official and individual capacities; Tim F. McClain, Superintendent of the Oregon State Police, in his official and individual capacities; and Randie Martz, Superintendent of the Oregon State Police, in his official and individual capacities.

Plaintiffs-appellees in the court of appeals were Michael Moss, Lesley Adams, Beth Wilcox, Richard Royer, Lee Frances Torelle, Mischelle Elkovich, Anna Vine (formerly known as Anna Boyd), and the Jackson County Pacific Green Party.

Several other individuals and entities were defendants in the district court but did not file notices of appeal and were neither appellants nor appellees in the court of appeals. See Pet. App. 1a-3a.

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U.S. Const:
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18 U.S.C. 3056(a)(1) 42, 50
18 U.S.C. 3056(a)(5)-(6) 50
18 U.S.C. 3056(a)(7) 50
18 U.S.C. 3056(e)(1) 50
Fed. R. Civ. P. 8(a)(2) 39
Sup. Ct. R. 12.6 3

Miscellaneous: Page

Ibrahim Barzak, *Protesters Throw Eggs, Shoe at French Official Visiting Gaza*, Wash. Times (Jan. 21, 2011), http://www.washingtontimes.com/news/2011/jan/21/protesters-throw-eggs-shoe-french-official-visitin/ 35

Elisabeth Bumiller, *Inside the Presidency*, National Geographic (Jan. 2009), http://ngm.nationalgeographic.com/2009/01/president/bumiller-text/1 46

Hollie Clemence, *Eggs and Shoe Thrown at Iran President on Return Home*, The Times (Sept. 29, 2013), http://www.thetimes.co.uk/tto/news/world/middleeast/article3881931.ece 35

Dan Eggen & Michael A. Fletcher, *FBI: Grenade Was a Threat to Bush*, Wash. Post (May 19, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/05/18/AR2005051800470.html 44

Michael Janofsky, *First Inauguration Since 9/11 Spurs Tightest Security*, N.Y. Times (Dec. 13, 2004), http://select.nytimes.com/gst/abstract.html?res=F5071FFD34550C708DDDAB0994DC404482&fta=y&incamp=archive:article_related 34

Scott Lindlaw, *In an Election Season, Bush Brings Presidential Pomp*, Laredo Morning Times (Oct. 25, 2004), http://airwolf.lmtonline.com/news/archive/102504/pagea11.pdf 46

Suzi Parker, *Hillary Clinton in Egypt, Pelted with Tomatoes and Taunts of 'Monica!'*, WPPolitics (July 16, 2012), http://www.washingtonpost.com/blogs/she-the-people/post/hillary-clinton-in-egypt-pelted-with-tomatoes-and-taunts-of-monica/2012/07/16/gJQA8E7HpW_blog.html 35

Miscellaneous—Continued: Page

John Pearley Huffman, *The Secret Seven: The Top Presidential Limousines of All Time*, Popular Mechanics (Jan. 20, 2009), http://www.popularmechanics.com/cars/news/vintage-speed/4300349 46

Kirit Radia, *Communist Protesters Throw Red Paint on Clinton's Motorcade*, abcNews (Nov. 16, 2011), http://abcnews.go.com/blogs/politics/2011/11/communist-protesters-throw-red-paint-on-clintons-motorcade/#undefined 35

Alex Stevenson, *Eggs, Flour and Green Slime: Britain's Ten Yuckiest Political Protests*, politics.co.uk. (Aug. 14, 2013), http://www.politics.co.uk/comment-analysis/2013/08/14/eggs-flour-and-green-slime-britain-s-ten-yuckiest-political 34

Juli Weiner, *Books, Eggs, and Shoes: All Things That Have Been Thrown at U.S. Presidents*, Vanity Fair (Oct. 11, 2010), http://www.vanityfair.com/online/daily/2010/10/books-eggs-and-shoes-all-things-that-have-been-thrown-at-us-presidents 34

5C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* (3d ed. 2004) 44

In the Supreme Court of the United States

No. 13-115

TIM WOOD AND ROB SAVAGE, PETITIONERS

v.

MICHAEL MOSS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals, as modified upon denial of rehearing en banc (Pet. App. 1a-59a), is reported at 711 F.3d 941. The order of the district court and the report and recommendation of the magistrate judge (Pet. App. 60a-157a) are reported at 750 F. Supp. 2d 1197. The opinion of the court of appeals following an earlier appeal is reported at 572 F.3d 962. The previously appealed order of the district court and the report and recommendation of the magistrate judge are available at 2007 WL 2915608.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 2012. A petition for rehearing was denied on February 26, 2013 (Pet. App. 8a). On May 16, 2013, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including

June 27, 2013. On June 20, 2013, Justice Kennedy further extended the time to July 26, 2013, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in relevant part, that "Congress shall make no law * * * abridging the freedom of speech."

STATEMENT

1. The complaint in this case seeks to hold agents of the United States Secret Service personally liable for damages (including punitive damages) under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for the manner in which they established a security perimeter around the President during a last-minute, unscheduled stop for dinner. Pet. App. 205a-206a; see *id.* at 172a-180a, 198a-201a. As this Court has recognized, "[t]he Nation undoubtedly has a valid, even an overwhelming, interest in protecting the safety of its Chief Executive," *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam), and federal law entrusts that responsibility to the Secret Service. The Secret Service is charged by statute with the physical security of not only the President, but also the Vice President, the families of the President and Vice President, and a number of other designated persons. 18 U.S.C. 3056(a). The President and Vice President are required by law to accept Secret Service protection. *Ibid.*

According to the allegations of the complaint, which are taken as true for present purposes, petitioners were two Secret Service agents "assigned to

provide security for" President George W. Bush on the evening of October 14, 2004. Pet. App. 165a. President Bush was scheduled to spend the evening at a cottage in Jacksonville, Oregon. *Id.* at 172a. Respondents are members of a group of 200 to 300 anti-Bush demonstrators who, after making advance arrangements with the local police, assembled about two blocks away from the cottage. *Id.* at 172a-174a.[1] A "similarly sized group of pro-Bush demonstrators" assembled across the street. *Id.* at 174a, 212a.

After the two groups had assembled, the President decided to make a last-minute, unscheduled stop to dine on an outdoor patio at the Jacksonville Inn. Pet. App. 175a. The Inn was located on California Street, on the same block where respondents were standing. *Id.* at 212a. After the demonstrators learned of the latebreaking change in plans, they clustered heavily on the side of California Street that included the Inn. *Id.* at 175a. The positions of the demonstrators at that point are illustrated in Diagram A (*infra*, and in the appendix to this brief), reproduced from the complaint.

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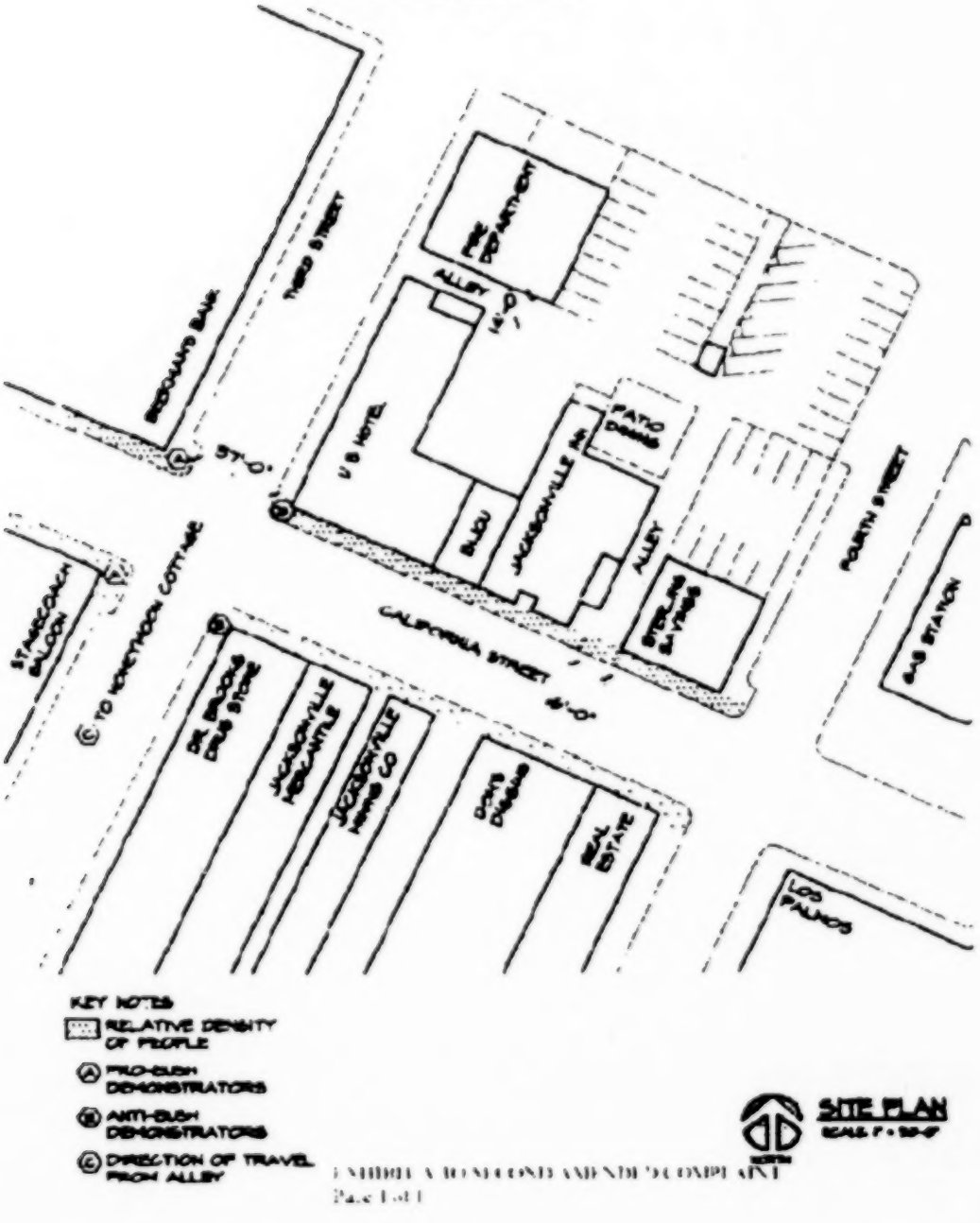
[1] Respondents in this Court include the anti-Bush demonstrators, the Jackson County Pacific Green Party, and state police officers. See Sup. Ct. R. 12.6; Pet. App. 1a-3a (caption identifying parties to the proceeding in the court of appeals). Because the court of appeals instructed the district court to dismiss the claim appealed by the state police officers (Pet. App. 58a), and because the Jackson County Pacific Green Party did not join the *Bivens* claim against petitioners (*id.* at 198a-199a), this petition uses the term "respondents" to refer to the seven individual anti-Bush demonstrators who were plaintiffs-appellees in the court of appeals. See p. II, *supra*.

DIAGRAM A



Source: Pet. App. 212a

Although the diagram shows that the anti-Bush demonstrators were at that time closer to the patio

area than were the pro-Bush demonstrators, the complaint alleges that, when the President arrived at the Inn, the assembled groups of anti- and pro-Bush demonstrators "had equal access" to the President because both groups were on California Street but on opposite sides of Third Street. Pet. App. 174a-175a. The Secret Service directed state and local police to secure the alley leading from California Street to the patio on which the President would be dining. *Id.* at 175a-176a. The police also cleared Third Street north of the intersection between Third and California Streets and began to prevent people from crossing Third Street. *Id.* at 176a. At this point, while the pro-Bush demonstrators were effectively cordoned off about half a block away, members of respondents' group remained on the sidewalk directly in front of an alley leading past the patio on which the President was dining. *Ibid.*; *id.* at 212a.

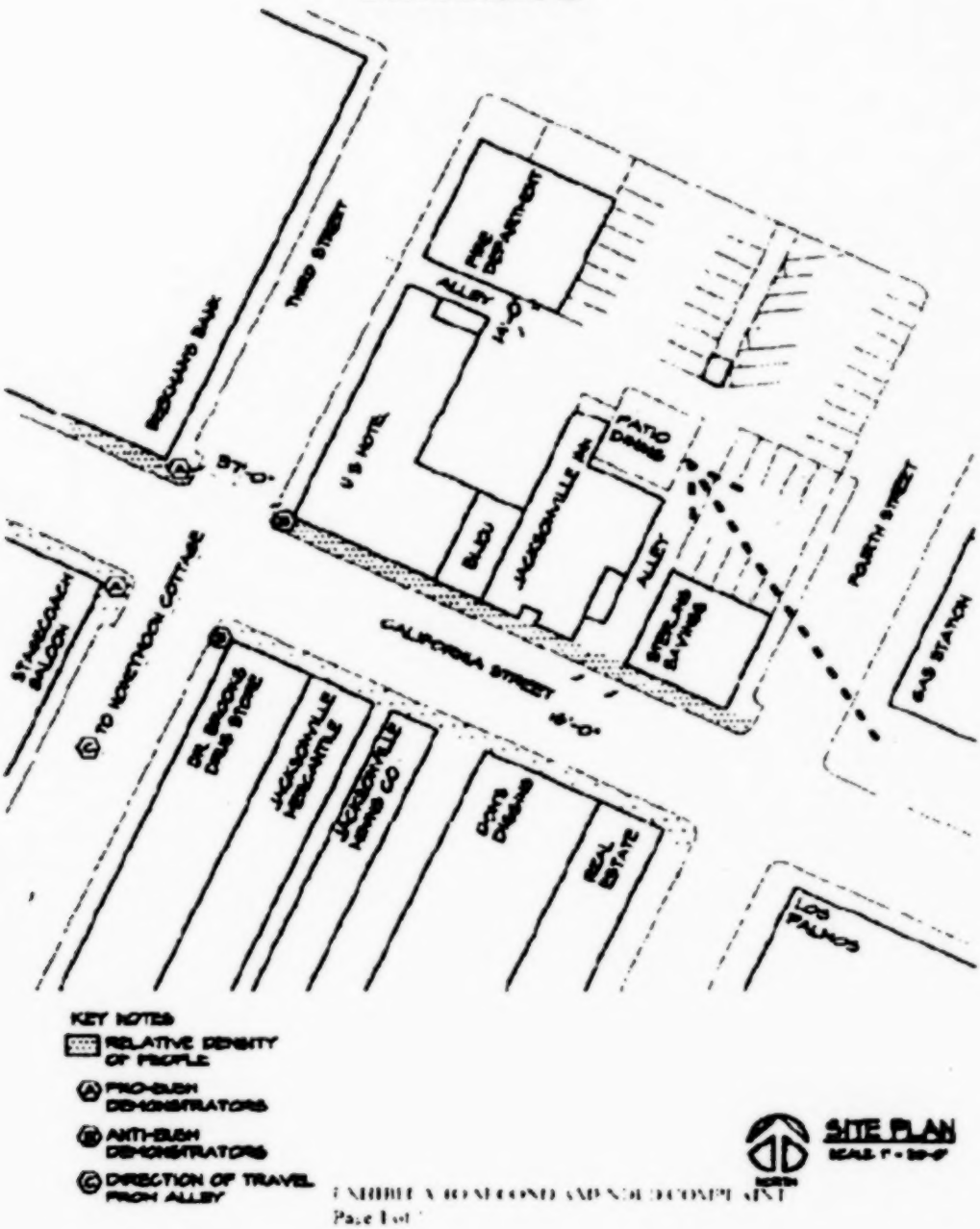
Shortly after the President arrived at the patio, petitioners directed state and local police to "clear California Street of all persons between Third and Fourth Streets." Pet. App. 177a. That was the block immediately adjacent to the alley leading past the patio, and it was also the block on which the anti-Bush demonstrators were standing. *Ibid.*; *id.* at 212a. Petitioners' order did not distinguish among demonstrators based on the viewpoint being expressed, but instead instructed that all the people in that area be "move[d] * * * to the east side of Fourth Street and subsequently to the east side of Fifth Street." *Id.* at 177a.

The map attached to the complaint (Diagram A) shows that, if the anti-Bush demonstrators had been moved only to the east side of Fourth Street, they would have remained slightly closer to the President

than the pro-Bush demonstrators. Pet. App. 212a (illustrating that patio was closer to Fourth Street than to Third Street). However, as illustrated on Diagram B (*infra*, and in the appendix to this brief), while the pro-Bush demonstrators had a large building (the U.S. Hotel) between them and the President, the anti-Bush demonstrators, while on the east side of Fourth Street, would have had their line of sight to the President blocked only by the patio's six-foot-high wooden fence. See *id.* at 176a (alleging the existence of the fence). At their final location on the east side of Fifth Street, the anti-Bush demonstrators were less than a block farther from the patio than the pro-Bush demonstrators. *Id.* at 212a. Respondents allege, in a portion of the complaint not at issue here, that state and local police officers "us[ed] clubs, pepper spray bullets, and forceful shoving" to move them. *Id.* at 180a.

Respondents allege that, according to the police, petitioners "told [the police] that the reason for the Secret Service's request" to move the people on the block directly adjacent to the California Street alley "was that they did not want anyone within handgun or explosive range of the President." Pet. App. 177a. Respondents claim that any such security rationale "was false * * * because there was no significant security difference between the two groups of demonstrators." *Id.* at 177a-178a. In respondents' view, if that security rationale had been the agents' actual reason for moving the anti-Bush demonstrators, petitioners would "have requested or directed that the pro-Bush demonstrators * * * be moved further to the west so that they would not be in range of the

DIAGRAM B



Source: Pet. App. 212a (arrow added)

President as [his motorcade] travelled from the Inn to" the cottage where he would spend the night, and

would also "have requested or directed that all persons dining, staying at, or visiting the Inn who had not been screened * * * be removed from the Inn." *Id.* at 178a; see *id.* at 95a. Respondents allege that petitioners' actual motivation in moving them was to suppress their speech. *Id.* at 183a-185a.

The complaint recognizes that the Secret Service has "promulgated written guidelines, directives, instructions and rules" that prohibit discrimination against demonstrators on the basis of their viewpoint. Pet. App. 184a. Respondents allege, however, that those documents "do not represent the actual policy and practice of the Secret Service." *Ibid.* Respondents further allege that the Secret Service has a history of "discriminating against First Amendment expression," *id.* at 181a (capitalization modified), and that "[t]he White House under President George W. Bush * * * sought to prevent or minimize the President's exposure to dissent or opposition during his public appearances and travels," *id.* at 182a-183a. In support of that allegation, respondents invoke portions of a manual for the White House Advance Team (which is not part of the Secret Service) and published reports of "numerous other occasions" on which the Secret Service purportedly sought to shield President Bush from "anti-government expressive activity." *Id.* at 189a-194a, 213a-217a; see *id.* at 42a, 99a. They allege that petitioners' actions "on October 14, 2004, were an implementation of this actual policy and practice" of viewpoint discrimination in violation of the First Amendment. *Id.* at 185a-186a. Respondents do not allege, however, that petitioners themselves were involved in any of the prior incidents.

2. In 2006, respondents filed a first amended complaint against petitioners, the director of the Secret Service, and various state and local officials, seeking compensatory and punitive damages, as well as declaratory and injunctive relief, for alleged violations of state law and respondents' First, Fourth, Fifth, and Fourteenth Amendment rights. Pet. App. 65a-66a.[2] The district court dismissed most of those claims. *Id.* at 67a-68a. The district court declined, however, to dismiss the First Amendment *Bivens* claim against petitioners and rejected petitioners' defense of qualified immunity. *Ibid.*

Petitioners filed an interlocutory appeal, and the court of appeals reversed, concluding that "[t]he factual content contained within the complaint does not allow us to reasonably infer that [petitioners] ordered the relocation of [respondents'] demonstration because of its anti-Bush message." 572 F.3d at 972. The court of appeals did, however, grant respondents leave to replead, because their initial complaint had been filed before two decisions of this Court—*Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009)—that had clarified the applicable pleading standards.

In 2009, respondents filed a second amended complaint, which included the same claims as the first but with some added factual allegations. Pet. App. 30a, 64a, 67a. Petitioners (and other defendants) filed

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[2] Respondents' claims included a claim under the Administrative Procedure Act, 5 U.S.C. 702, seeking to prohibit the Secret Service from, *inter alia*, "[b]arring or forcing anti-government demonstrators from areas where pro-government demonstrators are allowed to be present." 06-cv-03045 Docket entry No. 34 ¶¶ 3, 79 (D. Or. Oct. 5, 2006).

motions to dismiss on qualified-immunity and other grounds. *Id.* at 71a. The district court, adopting the report and recommendation of the magistrate judge, granted the motions to dismiss in part and denied them in part. *Id.* at 60a-62a. With respect to respondents' First Amendment *Bivens* claim against petitioners, the court found that the second amended complaint met "the stricter pleading standards imposed by" *Twombly* and *Iqbal*. *Id.* at 61a; see *id.* at 89a-114a. The court also concluded that petitioners "have not shown, at least at this stage of the litigation, that they are entitled to qualified immunity." *Id.* at 61a; see *id.* at 114a-121a.

3. Petitioners filed another interlocutory appeal. Pet. App. 30a-31a. As in the first appeal, the court of appeals recognized that government officials should receive qualified immunity from a constitutional-tort suit unless (1) the plaintiffs have alleged facts that "make out a violation of a constitutional right," and (2) "the right at issue was clearly established at the time of [the] defendant's alleged misconduct." *Id.* at 31a-32a (brackets in original) (quoting *Pearson* v. *Callahan*, 555 U.S. 223, 232 (2009)); see 572 F.3d at 967-968. This time, however, the court of appeals concluded that respondents' First Amendment claim against petitioners could proceed. Pet. App. 31a-50a, 58a.

a. The court of appeals reasoned that "[a] restriction on speech is viewpoint-based if (1) on its face, it distinguishes between types of speech or speakers based on the viewpoint expressed; or (2) though neutral on its face, the regulation is motivated by the desire to suppress a particular viewpoint." Pet. App. 35a. The court held that respondents' complaint was

sufficient to proceed on both of those theories of unlawful viewpoint discrimination. *Id.* at 35a-43a.

First, the court of appeals concluded that the complaint adequately alleged facial discrimination against respondents for their political views. Pet. App. 36a-38a. The court reasoned that, after the anti-Bush demonstrators were moved, they were "more than a block farther from where the President was dining than [were] the pro-Bush demonstrators, and, one can infer, were therefore less able to communicate effectively with the President, media, or anyone else inside or near the Inn." *Id.* at 37a. The court also found it "critical[]" that, as a result of the move, "the anti-Bush protestors were two blocks away from the [post-dinner] motorcade route, while the pro-Bush demonstrators remained along it." *Ibid.* The court dismissed petitioners' contention that the "armored limousine" that would carry the President in that motorcade "had far greater security than the open-air patio where the President dined," stating that this contention "rests on facts outside of the complaint" and that "a viewpoint-neutral rationale cannot transform a facially discriminatory policy * * * into a valid one." *Id.* at 37a-38a.

Second, the court of appeals concluded that the complaint "would be adequate to establish a First Amendment violation even if there had been no pro-Bush demonstrators and therefore no differential treatment," because it adequately alleged that petitioners "acted with an impermissible motive of shielding the President from those expressing disapproval of him or his policies." Pet. App. 38a-39a. The court reasoned that respondents had "plead[ed] facts that make plausible their claim that they were moved be-

cause of their viewpoint—that the security rationale, if indeed offered by the agents at all, was pretextual." *Id.* at 39a. The court's reasoning was based on respondents' "asser[tion]" that, because they had been separated from the outdoor patio by a six-foot-high fence, and from the alley by police officers in riot gear, "they posed no threat to the President, and there was thus no reason for them to be moved from their initial location." *Id.* at 40a. The court also reasoned that, while it had found respondents' allegation of the Secret Service's "'officially authorized pattern and practice' of shielding the President from dissent" to be impermissibly "conclusory" when it had reviewed the first amended complaint, the second amended complaint "elaborates in much more detail" on that allegation. *Id.* at 41a. The additional detail came in the form of 12 allegedly "similar instances of viewpoint discrimination against protestors expressing negative views of the President" involving different agents at different times and locations, as well as excerpts from a Presidential Advance Manual that "direct[] the President's advance team to 'work with the Secret Service * * * to designate a protest area * * * , preferably not in view of the event site or motorcade route.'" *Id.* at 41a-42a (emphasis omitted).

b. The court of appeals additionally held that petitioners are not entitled to qualified immunity, rejecting petitioners' argument that the First Amendment right respondents "claim was infringed" was not "clearly established in the specific context at issue here." Pet. App. 44a; see *id.* at 43a-47a. Relying primarily on decisions of this Court addressing claims of viewpoint discrimination in other contexts, the court

of appeals reasoned that taking respondents' "allegation of discriminatory motive as true, it is clear that no reasonable agent would think that it was permissible under the First Amendment to direct the police to move protestors farther from the President because of the critical viewpoint they sought to express." *Id.* at 45a. The court reiterated that the anti-Bush group was "moved over a block farther from the Inn than the pro-Bush demonstrators," and that "based on the facts alleged, there are relevant ways" in which the two groups' "distances [from the President while he was dining] were not comparable." *Id.* at 44a. The court also found it "quite relevant" that "the pro-Bush demonstrators were permitted to remain along the President's motorcade route, while the anti-Bush protestors were kept away." *Ibid.*

c. In response to a dissent from denial of rehearing en banc (discussed below), the court of appeals amended its opinion to further explain its decision. Pet. App. 4a-8a, 47a-50a. The court stated that, in order for petitioners to prevail, "any explanation for the agents' differential treatment of the pro- and anti-Bush demonstrators would have to be so obviously applicable as to render the assertion of unconstitutional viewpoint discrimination implausible." *Id.* at 47a. The court believed, however, that "there is simply *no* apparent explanation for why the Secret Service agents permitted only the pro-Bush demonstrators, and not the anti-Bush protestors, to remain along the President's after-dinner motorcade route." *Ibid.* The court rejected the suggestion that the reason "the pro-Bush demonstrators were not moved" was because "they were ostensibly further than [respondents' group] from the patio where President Bush was

dining." *Ibid.* In the court's view, that explanation was "non-responsive" to the fact that the anti-Bush group was moved "a considerable distance, to a location" that was "not comparable to the place where the pro-Bush group was allowed to remain." *Id.* at 48a (citation and internal quotation marks omitted).

4. Petitioners sought rehearing en banc, which the court of appeals denied. Pet. App. 8a. In an opinion joined by seven other judges, Judge O'Scannlain dissented. *Id.* at 8a-23a. In the dissenters' view, the court of appeals' opinion was "a textbook case-study of judicial second-guessing of the on-the-spot judgment that Secret Service agents assigned to protect the President have made about security needs." *Id.* at 8a (internal quotation marks and citation omitted). The opinion also "commit[ted] many familiar qualified immunity errors" by, *inter alia*, "afford[ing] unwarranted deference to legal conclusions in [respondents'] complaint" and "defin[ing] the right at issue too broadly." *Id.* at 22a; see *id.* at 12a-18a.

The dissenting judges reasoned that, "[b]y using [respondents'] allegations about [petitioners'] discriminatory motive as a starting point, * * * the panel turns *Iqbal* on its head." Pet. App. 12a. The dissenters also concluded that two legal propositions were not established with sufficient clarity for respondents to defeat petitioners' claim of qualified immunity. *Id.* at 18a. First, the dissenters found that moving respondents "to a location one block farther from the President than [the pro-Bush demonstrators] when creating a Presidential security perimeter" did not violate any clearly established First Amendment right because "before this decision, no law appeared to require Secret Service agents to ensure that groups of

differing viewpoints were positioned in locations exactly equidistant from the President at all times." *Ibid.*; see *id.* at 19a. Second, the dissenters stated that it "seems absurd" to construe the First Amendment as requiring Secret Service agents "to return a group of demonstrators to their original location before the President could leave in his motorcade." *Id.* at 20a.

The dissenting judges additionally reasoned that the court of appeals' decision "renders the protections of qualified immunity toothless"; "hamstrings Secret Service agents, who must now choose between ensuring the safety of the President and subjecting themselves to First Amendment liability"; and imposes on Secret Service agents a "newly created duty to act like concert ushers—ensuring with tape-measure accuracy that everyone who wants to demonstrate near the President has an equally good view of the show." Pet. App. 8a, 22a-23a. Recognizing that the Ninth Circuit's "track record in deciding qualified immunity cases is far from exemplary," the dissenters expressed "concern[]" that, "with this decision, * * * our storied losing streak will continue." *Id.* at 22a & n.3 (citing four qualified-immunity cases in which this Court has reversed the Ninth Circuit).

SUMMARY OF ARGUMENT

The court of appeals erred in denying petitioners qualified immunity from respondents' allegations that they engaged in viewpoint discrimination while establishing a security perimeter around the President during a last-minute, unscheduled stop for dinner. As the eight judges who dissented from the denial of rehearing en banc recognized, the court of appeals' decision reflects "many familiar qualified immunity

errors." Pet. App. 22a. The decision flouts this Court's repeated exhortations that, for purposes of determining whether a defendant violated a clearly established constitutional right, the court must consider the specific context of the alleged violation rather than describing the constitutional right at an abstract or general level. And it effectively disregards this Court's decision in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), by permitting discovery, and potentially a trial with the risk of punitive damages, in the absence of sufficient allegations of discriminatory intent. Most troubling of all, it commits these errors notwithstanding this Court's recognition that principles of qualified immunity are "nowhere more important than when the specter of Presidential assassination is raised." *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam).

A. Under the doctrine of qualified immunity, if the law at the time of the events at issue "did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation." *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam). The Court has "emphasize[d] that" the qualified-immunity determination "'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Ibid.* (quoting *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001)). The court of appeals ignored that principle when it denied qualified immunity to petitioners based on the broad general proposition that viewpoint discrimination is unlawful. The question the court of appeals should have asked was whether petitioners had adequate notice that their particular actions in establishing a security perimeter around the

President would violate the First Amendment. Had the inquiry been properly framed, petitioners' entitlement to qualified immunity would have been clear.

In a multitude of circumstances, legitimate crowd-control measures may have the practical effect of placing different speakers expressing different views at different distances from the President or other high-level officials whom Secret Service agents have a duty to protect. Nothing in this Court's decisions even suggests, much less clearly establishes, that such disparate impact standing alone violates the First Amendment. Respondents err in suggesting that the only options available to petitioners were (1) to take the security risk of leaving respondents in their initial position; (2) to move the pro-Bush demonstrators farther away, even though their location raised no security concerns, in order to equalize the groups' distances; or (3) to preclude the President from dining at the Inn altogether.

Moreover, even assuming *arguendo* that petitioners' actions took some account of respondents' speech, nothing in this Court's decisions clearly establishes that a Secret Service agent must categorically disregard someone's words in deciding how close that person may get to the President. As Justice Ginsburg noted two Terms ago, officials engaged in a "protective function" will "rightly take into account words spoken to, or in the proximity of, the person whose safety is their charge" when "determining whether" the speaker "pose[s] an immediate threat" to the protectee. *Reichle* v. *Howards*, 132 S. Ct. 2088, 2097 (2012) (Ginsburg, J., concurring in the judgment).

B. Respondents attempt to bring at least one aspect of their claim within clearly-established law by

alleging that petitioners did not move respondents to protect the President, but instead with the sole and specific purpose of suppressing respondents' speech. Their allegations of unlawful animus, however, are insufficient to survive a motion to dismiss.

As this Court made clear in *Iqbal*, when the defendant's discriminatory intent is a necessary element of a constitutional claim, the plaintiff cannot defeat a motion to dismiss simply by alleging in conclusory terms that the defendant acted with the requisite unlawful motive. Rather, the plaintiff must allege specific facts that, taken as true, raise a sound inference of unconstitutional motivation. Respondents did not satisfy that requirement here. The court of appeals found respondents' factual allegations sufficient only by effectively requiring petitioners to negate the *possibility* of invidious intent. This Court has made clear, however, that even when unconstitutional motive is a *conceivable* explanation for the facts alleged in a plaintiff's complaint, a motion to dismiss should be granted if a *more likely* innocent explanation for the alleged facts exists.

On the facts as alleged, it is considerably more likely that petitioners' actions following the President's last-minute change of plans were motivated by their stated security rationale—moving everyone out of handgun or explosive range—than by a desire to suppress speech. In their original location, respondents were separated from the President by only an 80-foot alley and a wooden fence. Someone in the group of 200 to 300 demonstrators, or someone with illicit designs using the demonstrators as cover, could easily have thrown an explosive device within range of the President. In the alternate location to which respond-

ents originally were moved, they apparently had a direct line of sight to the fence behind which the President was sitting, creating the possibility of bullet-fire (or explosives) that would endanger the President. The other groups at the scene were not similarly situated. The pro-Bush demonstrators were separated from the President by buildings, and thus could not have reached him with bullets or explosives. And the other diners at the Inn had never expected to be near the President that evening, and thus presented a much lesser threat than respondents' group, whose proximity to the President was the result of considerable advance planning.

Respondents cannot "nudge [their] claims of invidious discrimination across the line from conceivable to plausible," *Iqbal*, 556 U.S. at 680 (internal quotation marks and citation omitted), by excerpting a manual for the White House Advance Team or by alleging viewpoint discrimination by other Secret Service agents at other times and other places. The manual excerpts address ticketed events, not unscheduled stops; the manual is directed to political employees of the White House, not the Secret Service; and the complaint recognizes that the Secret Service itself has explicit written policies prohibiting viewpoint discrimination. And respondents' conclusory allegations of viewpoint discrimination by *different* agents in *different* circumstances cannot support a plausible inference of viewpoint discrimination by *these* agents in *these* circumstances.

The potential consequences of the decision below are substantial. Secret Service agents frequently operate in politically-charged environments as they seek to protect the President, the Vice-President, and

their families, along with other political figures. Under the Ninth Circuit's decision, those agents may now be individually liable for damages, including punitive damages, whenever their duties require them to control a crowd of demonstrators. That decision must be overturned in order to reinforce that the safety of the principals, not the threat of personal liability, should animate the decisions of those charged with protecting our Nation's leaders.

ARGUMENT

RESPONDENTS' ALLEGATIONS THAT PETITIONERS PROTECTED THE PRESIDENT IN A VIEWPOINT-DISCRIMINATORY MANNER FAIL TO STATE A VALID *BIVENS* CLAIM

This Court has never expressly endorsed a judicially-created cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against federal officials in their individual capacities for alleged violations of the First Amendment. See *Reichle* v. *Howards*, 132 S. Ct. 2088, 2093 n.4 (2012); *Ashcroft* v. *Iqbal*, 556 U.S. 662, 675 (2009). Assuming such a cause of action exists, however, the doctrine of qualified immunity "shields officials from suit" so long as their conduct "did not violate clearly established * * * constitutional rights of which a reasonable person would have known." *Ortiz* v. *Jordan*, 131 S. Ct. 884, 888 (2011) (brackets omitted) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). "The qualified immunity standard," the Court has explained, "'gives ample room for mistaken judgments' by protecting 'all but the plainly incompetent or those who knowingly violate the law,'" in order that "'officials should not err always on the side of caution' because they fear being sued."

Hunter v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (quoting *Malley* v. *Briggs*, 475 U.S. 335, 343 (1986), and *Davis* v. *Scherer*, 468 U.S. 183, 196 (1984)). "Our national experience has taught that this principle is nowhere more important than when the specter of Presidential assassination is raised." *Ibid.*

Notwithstanding the express and obvious security rationale for moving respondents' group farther away from the President, the court of appeals mistakenly denied petitioners the protection that the qualified-immunity doctrine is designed to provide. Its decision cannot be squared with this Court's precedents. First, the court of appeals disregarded this Court's repeated admonitions against "defin[ing] clearly established law at a high level of generality." *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011). It did not identify a single decision interpreting the First Amendment to require that, in a crowd-control situation, all groups of demonstrators be equidistant from an official receiving law-enforcement protection. Instead, it erroneously presumed that a reasonable Secret Service agent would infer that specific rule from the more generalized proposition disfavoring viewpoint discrimination. Second, the court of appeals effectively disregarded this Court's decision in *Ashcroft* v. *Iqbal*, *supra*, in concluding that respondents had adequately pleaded discriminatory intent, when petitioners' alleged actions were "more likely explained by" legitimate security concerns, 556 U.S. at 680, than a desire to suppress speech. See *id.* at 673 (observing that "the sufficiency of * * * [the] pleadings is both inextricably intertwined with, and directly implicated by, the qualified-immunity de-

fense") (internal quotation marks and citations omitted). Those errors require reversal.

A. Respondents Had No Clearly Established Constitutional Right To Remain Within A Particular Distance Of The President

The court of appeals denied petitioners the defense of qualified immunity on the ground that "[i]t is 'beyond debate' that, particularly in a public forum, government officials may not disadvantage speakers based on their viewpoint." Pet. App. 45a (quoting *al-Kidd*, 131 S. Ct. at 2083). That general proposition does not clearly establish the more specific proposition that "moving one group to a location one block farther from the President than another when creating a Presidential security perimeter constituted a violation of that group's First Amendment rights." *Id.* at 18a (O'Scannlain, J., dissenting from the denial of rehearing en banc). Indeed, no precedent from this Court, the Ninth Circuit, or any other circuit "require[d] Secret Service agents to ensure that groups of differing viewpoints were positioned in locations exactly equidistant from the President at all times." *Id.* at 19a (O'Scannlain, J., dissenting from the denial of rehearing en banc).

1. For the past 25 years, this Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality" in conducting qualified-immunity analysis. *al-Kidd*, 131 S. Ct. at 2084 (internal citation omitted); see *Brosseau* v. *Haugen*, 543 U.S. 194, 199, 201 (2004) (per curiam) (summarily reversing for evaluating qualified immunity "at a high level of generality"); *Saucier* v. *Katz*, 533 U.S. 194, 200 (2001) (reversing because "whether the right was clearly established

must be considered on a more specific level than recognized by the Court of Appeals"); see also *Wilson* v. *Layne*, 526 U.S. 603, 615 (1999) (explaining that "the right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established"); *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987) (explaining that evaluating a claim at an abstract level of generality would transform "a guarantee of immunity into a rule of pleading").

The inquiry into whether an official's actions violated clearly established law "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Brosseau*, 543 U.S. at 198 (quoting *Saucier*, 533 U.S. at 201). To do otherwise, this Court has explained, would allow plaintiffs "to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." *Anderson*, 483 U.S. at 639. "Such an approach," the Court continued, "would destroy 'the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties,' by making it impossible for officials 'reasonably to anticipate when their conduct may give rise to liability for damages.'" *Ibid.* (quoting *Davis*, 468 U.S. at 195 (brackets omitted)).

This Court has accordingly refused to permit rights framed at the level of generality of the right described by the court of appeals here—the right to be free from "viewpoint discrimination in a public forum," Pet. App. 49a—to provide the basis for divesting an official of qualified immunity. In *Anderson* v. *Creighton*,

supra, the Court framed the relevant inquiry not in terms of "the right to be free from warrantless searches of one's home unless the searching officers have probable cause and there are exigent circumstances," but instead in terms of whether it was clearly established that "the circumstances with which [the officer in that case] was confronted did not constitute probable cause and exigent circumstances." 483 U.S. at 640-641. In *Wilson* v. *Layne*, *supra*, the Court framed the relevant inquiry not in terms of "the protections of the Fourth Amendment" generally, but instead in terms of whether "a reasonable officer could have believed that bringing members of the media into a home during the execution of an arrest warrant was lawful, in light of clearly established law and the information the officers possessed." 526 U.S. at 615. In *Saucier* v. *Katz*, *supra*, the Court framed the relevant inquiry not in terms of "the general proposition that use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness," but instead in terms of whether a "reasonable officer in petitioner's position could have believed that hurrying respondent away from the scene, where the Vice President was speaking and respondent had just approached the fence designed to separate the public from the speakers, was within the bounds of appropriate police responses." 533 U.S. at 201-202, 209. And in *Brosseau* v. *Haugen*, *supra*, the Court framed the relevant inquiry not in terms of the general Fourth Amendment right against the use of excessive force, but instead in terms of whether it was clearly established that an officer cannot "shoot a disturbed felon, set on avoiding capture through vehicular flight, when persons in the

immediate area are at risk from that flight." 543 U.S. at 200.

The principle that the right must be defined with specificity applies equally to constitutional torts alleging the violation of First Amendment rights. In *Reichle* v. *Howards*, *supra*, this Court concluded that two Secret Service agents should receive qualified immunity "from a suit for allegedly arresting a suspect in retaliation for his political speech, when the agents had probable cause to arrest the suspect for committing a federal crime." 132 S. Ct. at 2091; see *id.* at 2097. The Court emphasized that "the right allegedly violated must be established, not as a broad general proposition, but in a particularized sense so that the contours of the right are clear to a reasonable official." *Id.* at 2094 (internal quotation marks and citation omitted). The Court thus framed the relevant inquiry not in terms of the "general right to be free from retaliation for one's speech," but instead in terms of "the more specific right to be free from a retaliatory arrest that is otherwise supported by probable cause." *Ibid.*; see *id.* at 2094 n.5 ("[W]e do not define clearly established law at such a 'high level of generality.'") (quoting *al-Kidd*, 131 S. Ct. at 2084).

2. As the Tenth Circuit has correctly recognized, "merely stating that the government cannot engage in viewpoint discrimination is just about as general as stating that the government cannot engage in unreasonable searches and seizures—an approach that is too general for the qualified immunity analysis." *Weise* v. *Casper*, 593 F.3d 1163, 1168 n.1, cert. denied, 131 S. Ct. 7 (2010). Yet the court of appeals in this case took that very approach. Pet. App. 45a-46a. It thereby sidestepped the necessary inquiry into

whether any "controlling authority" or "robust consensus of cases of persuasive authority," *al-Kidd*, 131 S. Ct. at 2084 (internal quotation marks and citation omitted), would have made "clear to a reasonable officer" in petitioners' position "that his conduct was unlawful in the situation he confronted," *Saucier*, 533 U.S. at 202. That inquiry would have required a decision in petitioners' favor.

Respondents contend that petitioners violated clearly established law by directing that respondents' group be moved from an initial location closer to the President than the pro-Bush demonstrators to a location slightly less than a block farther from the President than the pro-Bush demonstrators. Br. in Opp. 26. Until the court of appeals issued the decision below, however, no decision of this Court, or of the Ninth Circuit, had required such precise calibration by Secret Service agents. See Pet. App. 19a (O'Scannlain, J., dissenting from the denial of rehearing en banc) (noting the absence of decisions that "appeared to require Secret Service agents to ensure that groups of differing viewpoints were positioned in locations exactly equidistant from the President at all times").

The only case that the court of appeals identified as "closely on point," Pet. App. 46a, was the D.C. Circuit's decision in *Mahoney* v. *Babbitt*, 105 F.3d 1452 (1997). It is far from clear that a single out-of-circuit decision could ever be sufficient to clearly establish the law in the Ninth Circuit on this subject. See *Reichle*, 132 S. Ct. at 2094 (reserving the question whether the Tenth Circuit's *own* authority could clearly establish the law in the circumstances of that case). In any event, *Mahoney* is not a close analogue to this

case. In *Mahoney*, counsel for the National Park Service advised that any member of a certain group attempting to protest President Clinton's late-term abortion policies along the Inaugural Parade route "would be subject to arrest and fine." 105 F.3d at 1456. The government conceded in litigation that its policy was viewpoint-discriminatory and that if the group members "were to carry signs offering congratulations or best wishes to the President," they "would not be subject to arrest." *Ibid.* The D.C. Circuit found such deliberate viewpoint discrimination not to be justified under the First Amendment. *Id.* at 1456-1460. It had no occasion, however, to address the distinct circumstances of this case, which involve snap decisions by Secret Service agents about how, without the benefit of advance security work, to deal with two groups of demonstrators who were near an outdoor area where the President was dining.

Respondents' own efforts to identify clearly established law on this subject—which have focused, for the most part, on out-of-circuit decisions—are similarly unavailing. Some of the circuit decisions they have cited (Br. in Opp. 15-16) have involved categorical bans on certain forms of expressive activity in a particular area. See *Lederman* v. *United States*, 291 F.3d 36, 39 (D.C. Cir. 2002) (ban on demonstrations on certain sidewalks near the Capitol building); *Pursley* v. *City of Fayetteville*, 820 F.2d 951, 952 (8th Cir. 1987) (ban on all pickets and demonstrations in front of residences or dwelling places). Other decisions (Br. in Opp. 19, 21) involved entirely excluding one viewpoint from an otherwise-open forum. See *Metro Display Adver., Inc.* v. *City of Victorville*, 143 F.3d 1191, 1193-1194 (9th Cir. 1998) (attempt to ban pro-union

displays in bus shelters); see also *Sparrow* v. *Goodman*, 361 F. Supp. 566, 583-584 (W.D.N.C. 1973) (exclusion of various likely protesters from event in the Charlotte Coliseum), aff'd *sub nom. Rowley* v. *McMillan*, 502 F.2d 1326 (4th Cir. 1974). But respondents identify no cases finding a First Amendment violation when stated security considerations merely caused two groups with different views to end up at marginally different distances from a public official (let alone the President), especially when the groups were not even similarly situated at the outset.[3]

3. Both the court of appeals (Pet. App. 45a) and respondents (Br. in Opp. 24-26) rely heavily on the proposition that denial of qualified immunity does not

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[3] Respondents cite (Br. in Opp. 22) one case that involved the arrest of a protester who tried to carry a sign in close proximity to a presidential speech, outside the designated "pro" and "anti" demonstration zones that had been established in advance. See *Johnson* v. *Bax*, 63 F.3d 154, 156 (2d Cir. 1995). The court there, however, did not conclude that the plaintiff had a viable First Amendment claim, but instead ruled only that the district court had erroneously treated the complaint as not even having alleged a First Amendment claim. *Id.* at 157-159. Respondents also cite (Br. in Opp. 21-22) a handful of district-court decisions, but district-court decisions cannot clearly establish the law. See *al-Kidd*, 131 S. Ct. at 2084 (explaining that "[e]ven a district judge's *ipse dixit* of a holding is not 'controlling authority' in any jurisdiction, much less in the entire United States") (citation omitted). In any event, those decisions are inapposite, because they involve attempts to ban persons of a particular view entirely from an event. *Pledge of Resistance* v. *We the People 200, Inc.*, 665 F. Supp. 414, 415-417 (E.D. Pa. 1987) (attempt to ban peaceful demonstration activities by anti-war protesters and civil-rights groups in areas of bicentennial festivities in Philadelphia); *Butler* v. *United States*, 365 F. Supp. 1035, 1037-1038 (D. Haw. 1973) (removal or exclusion of protesters from Air Force base during event to greet President Nixon and Japanese Premier).

"require a case directly on point," so long as "existing precedent * * * placed the statutory or constitutional question beyond debate." *al-Kidd*, 131 S. Ct. at 2083. Of course, "in an obvious case," general "standards can 'clearly establish' the answer, even without a body of relevant case law." *Brosseau*, 543 U.S. at 199 (citing, *inter alia*, *Hope* v. *Pelzer*, 536 U.S. 730, 738 (2002)). But it is "far from * * * obvious," *ibid.*, that creating a security perimeter that places supporters and protesters different distances from the President violates the First Amendment.

The general rule against "viewpoint discrimination" would have been of no help in determining whether the relatively trivial disparate impact alleged in this case, standing alone, violated the First Amendment. Among other things, "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron* v. *International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). The possibility that Secret Service agents' crowd-control measures will often have disparate impacts on the location of different individuals who are expressing different viewpoints does not in itself raise First Amendment concerns. See *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."). In light of the different geographical and topographical features of the various places that the President might visit—sometimes, as in this case, without advance warning—it would be impossible for the Secret Service to "ensur[e] with tape-measure accuracy that

everyone who wants to demonstrate near the President has an equally good view of the show." Pet. App. 8a (O'Scannlain, J., dissenting from the denial of rehearing en banc). That is especially true where, as here, the two groups did not have "an equally good view of the show" at the start.

Reasonable agents could readily have believed that it was permissible to move the anti-Bush group across Fifth Street without moving the pro-Bush group. The two groups posed different security concerns at the outset because the anti-Bush group was initially located significantly closer to, and at a site less screened from, the patio than was the pro-Bush group. Respondents' map makes clear that, even after the anti-Bush group was moved across Fourth Street, it was still closer to, and less screened from, the patio. See Diagram B, *supra*. At that point, the decision to move the anti-Bush group another block across Fifth Street did result in its being slightly farther from the President than the pro-Bush group.[4] A reasonable officer

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[4] The court of appeals described the anti-Bush group as being separated from the President "by more than a full square block[] and two roadways," and it characterized that distance as "more than a block farther * * * than the pro-Bush demonstrators." Pet. App. 37a, 48a. That calculation is belied by respondents' own map, which reveals that the pro-Bush group was itself separated from the alley leading to the patio by most of one block and one roadway. Diagram A, *supra*. Because that distance was *longer* than the distance from the alley to the east side of Fourth Street, the addition of precisely one more block (*i.e.*, the distance from the east side of Fourth Street to the east side of Fifth Street) necessarily resulted in a difference of less than one block between the two groups' distances from the alley. Since the pro-Bush group was itself nearly a block from the alley, the less-than-one-block difference casts serious doubt on the court of appeals' willingness to "infer" that the anti-Bush group was materially "less able" than

could have thought, however, that the enhanced ability of law-enforcement officers on the scene to engage in crowd control by using a cross-street as the line of demarcation outweighed any desire to calibrate distances more precisely.

The court of appeals attached "critical[]" significance to the fact that moving the anti-Bush demonstrators away from the alley next to the outdoor patio while the President was dining later resulted in their being two blocks farther than the pro-Bush group from the post-dinner motorcade route. See Pet. App. 37a; see *id.* at 37a-38a, 44a, 47a, 48a. But respondents' complaint does not allege that the anti-Bush group had any reasonable opportunity to move back to their original position between the time when the President left dinner and the time when his motorcade traveled down Third Street; it does not allege that the motorcade should have been required to wait for the demonstrators to move; and respondents have expressly disavowed any argument that petitioners were required to move them back to their original location once the President had finished his dinner, see Br. in Opp. 26.

Respondents' arguments only highlight the absence of relevant precedent. During oral argument in the court of appeals, respondents' counsel stated that, when petitioners arrived at the patio restaurant and

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the pro-Bush group "to communicate effectively with the President" while he was dining. *Id.* at 37a. So, too, does the failure of the second amended complaint to remedy a pleading deficiency that the court of appeals had previously identified in the first amended complaint: respondents did not allege they had been "moved to an area where the President could not hear their demonstration." 572 F.3d at 971.

discovered 200 to 300 people crowding the block immediately adjacent to the Inn, they should simply have "prevailed upon the President not to dine at the Inn" at all, or, in order to have "a basis to move the anti-Bush protestors a block east," "they should have moved the pro-Bush demonstrators a block west." Oral Argument at 42:22-43:36, *Moss* v. *United States Secret Serv.*, 675 F.3d 1213 (No. 10-36152), http://www.ca9.uscourts.gov/media/view.php?pk_id=0000008129. Nothing in this Court's viewpoint-discrimination jurisprudence, however, remotely establishes the proposition that respondents' desire to remain in their initial location trumps the President's freedom of movement. Nor does anything in the Court's decisions compel Secret Service agents to inquire into the political views of various groups and take additional steps to interfere with even more speech than security concerns would require in an attempt to keep opposing groups at roughly equal distances from the President. Indeed, had petitioners moved the pro-Bush group farther from the President simply because the location of the anti-Bush group presented security concerns, they might well have been sued for doing so. See, *e.g.*, *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988) (noting that a time, place, or manner regulation of speech should "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy") (citation omitted).

4. Even assuming *arguendo* that petitioners' decision to relocate respondents' group had some connection to the group's anti-Bush message (but see Part B, *infra*), the general principle against "viewpoint discrimination" would still fail to clearly establish the unconstitutionality of petitioners' actions. Distinc-

tions based on the views expressed in someone's speech are not invariably unlawful. For example, the Court has recognized that a police officer's decision whether to arrest a suspect may be informed by "wholly legitimate consideration" of the suspect's speech. *Reichle*, 132 S. Ct. at 2096. Similarly, the Court has held that the federal government may, consistent with the First Amendment, adopt a policy under which it prosecutes only vocal objectors to its military-draft laws. *Wayte* v. *United States*, 470 U.S. 598, 610-614 (1985). And the Court has explained that, when a defendant's "beliefs and associations"—as indicated by his speech—are relevant to his criminal conduct, a judge may take account of them in selecting the appropriate sentence. *Wisconsin* v. *Mitchell*, 508 U.S. 476, 486, 489-490 (1993).

In all of these situations, the views expressed are, or at least may be, germane to judgments, including predictive judgments, that the governmental official is required to make. See *Reichle*, 132 S. Ct. at 2095 (explaining that an "officer may decide to arrest the suspect because his speech * * * suggests a potential threat"); *Wayte*, 470 U.S. at 612-613 (explaining that protest letters written to the Selective Service "provided strong, perhaps conclusive evidence of the nonregistrant's intent not to comply—one of the elements of the offense"); *Mitchell*, 508 U.S. at 487-488 (explaining that "bias-inspired conduct * * * is thought to inflict greater individual and societal harm," because, *inter alia*, "bias-motivated crimes are more likely to provoke retaliatory crimes, inflict distinct emotional harms on their victims, and incite community unrest"). Similar logic applies in protecting the President.

As Justice Ginsburg explained in her concurring opinion in *Reichle*, Secret Service agents "rightly take into account words spoken to, or in the proximity of, the person whose safety is their charge." 132 S. Ct. at 2097 (Ginsburg, J., concurring in the judgment). No clearly established First Amendment principle requires Secret Service agents to disregard the commonsense proposition that someone who appears displeased (or even angry) with the President may be more likely to lash out in the heat of the moment and try to harm him than someone who appears pleased with the President. See *ibid.* (stating that the Secret Service agent defendants in *Reichle* were "duty bound to take the content of [the plaintiff's] statements into account in determining whether he posed an immediate threat to the Vice President's physical security"); cf. *Hunter*, 502 U.S. at 229-230 (Stevens, J., dissenting) ("Those who guard the life of the President properly rely on the slightest bits of evidence—nothing more than hunches or suspicion—in taking precautions to avoid the ever-present danger of assassination.") (internal quotation marks and citation omitted). Protesters have, for example, thrown objects at high-ranking officials or politicians on a number of occasions.[5]

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[5] See, *e.g.*, Juli Weiner, *Books, Eggs, and Shoes: All Things That Have Been Thrown at U.S. Presidents*, Vanity Fair (Oct. 11, 2010), http://www.vanityfair.com/online/daily/2010/10/books-eggs-and-shoes-all-things-that-have-been-thrown-at-us-presidents; Alex Stevenson, *Eggs, Flour and Green Slime: Britain's Ten Yuckiest Political Protests*, politics.co.uk. (Aug. 14, 2013), http://www.politics.co.uk/comment-analysis/2013/08/14/eggs-flour-and-green-slime-britain-s-ten-yuckiest-political (eggs, prophylactic filled with purple flour, green slime, and custard pie thrown at British politicians); Michael Janofsky, *First Inauguration Since 9/11 Spurs*

A reasonable officer in petitioners' position could legitimately conclude, in the absence of any contrary authority from this Court or the Ninth Circuit, that the Nation's "valid, even * * * overwhelming, interest in protecting the safety of its Chief Executive," *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam), justifies taking speech into account in assessing how close a particular person or group should be able to get to the President. See also *Rubin* v. *United States*, 525 U.S. 990, 990-991 (1998) (Breyer, J., dissenting from denial of certiorari) ("The physical security of the President of the United States has a special legal role to play in our constitutional system."). Nothing in this Court's jurisprudence would inform an agent that, for example, he must allow the President to shake hands with an invective-spewing detractor whenever the President has shaken hands with a supporter. And nothing would put the agent on

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Tightest Security, N.Y. Times (Dec. 13, 2004), http://select.nytimes.com/gst/abstract.html?res=F5071FFD34550C708DDDAB0994DC404482&fta=y&incamp=archive:article_related (eggs and debris thrown at President Bush's motorcade); Hollie Clemence, *Eggs and Shoe Thrown at Iran President on Return Home*, The Times (Sept. 29, 2013), http://www.thetimes.co.uk/tto/news/world/middleeast/article3881931.ece; Ibrahim Barzak, *Protesters Throw Eggs, Shoe at French Official Visiting Gaza*, Wash. Times (Jan. 21, 2011), http://www.washingtontimes.com/news/2011/jan/21/protesters-throw-eggs-shoe-french-official-visitin/; Kirit Radia, *Communist Protesters Throw Red Paint on Clinton's Motorcade*, abcNews (Nov. 16, 2011), http://abcnews.go.com/blogs/politics/2011/11/communist-protesters-throw-red-paint-on-clintons-motorcade/#undefined; Suzi Parker, *Hillary Clinton in Egypt, Pelted with Tomatoes and Taunts of 'Monica!'*, WPPolitics (July 16, 2012), http://www.washingtonpost.com/blogs/she-the-people/post/hillary-clinton-in-egypt-pelted-with-tomatoes-and-taunts-of-monica/2012/07/16/gJQA8E7HpW_blog.html.

notice that moving a group of anti-Bush demonstrators farther away from the President, assertedly for safety reasons, would necessarily be unconstitutional.

5. This case does not require the Court directly to decide whether or to what degree the First Amendment constrains Secret Service agents when they establish a protective perimeter around the President during an unscheduled stop. Rather, it is sufficient, for purposes of the qualified-immunity analysis here, for the Court simply to conclude that the answer would not have been obvious to a reasonable official in petitioners' position. See *Camreta* v. *Greene*, 131 S. Ct. 2020, 2031 (2011) (suggesting that this approach is most consistent with well-established principles of constitutional avoidance); *Pearson* v. *Callahan*, 555 U.S. 223, 236-242 (2009). Under the objective circumstances that petitioners faced, and given the comparatively small differences in the relative distances between the pro- and anti-Bush groups and the President, there is no sound reason to conclude that moving respondents, in itself, violated any clearly established constitutional right.

That "eight Court of Appeals judges agreed with [petitioners'] judgment in a case of first impression" strongly reinforces that petitioners should not be grouped with the "plainly incompetent or those who knowingly violate the law," to whom qualified immunity is denied. *al-Kidd*, 131 S. Ct. at 2085 (citation omitted). This Court has recognized that "it is unfair to subject police to money damages for picking the losing side of [a legal] controversy" on which "judges * * * disagree." *Wilson*, 526 U.S. at 618. Imposing such liability on members of the President's protective detail would go beyond mere unfairness. It

would send the message that Secret Service agents should elevate the most plaintiff-friendly interpretation of the First Amendment above their trained judgment about how best to safeguard the President. That message would undermine the qualified-immunity doctrine's goal of "encouraging the vigorous exercise of official authority," *Harlow*, 457 U.S. at 807 (citation omitted), in the very context in which this Court has recognized such encouragement to be the most critical. See *Hunter*, 502 U.S. at 229 (recognizing that the qualified-immunity doctrine's "accommodation for reasonable error" is "nowhere more important than when the specter of Presidential assassination is raised").

During a typical year, the President alone makes hundreds of stops or appearances in public areas around the country. Impromptu or unscheduled visits, like the 2004 visit to the restaurant patio in Jacksonville, are not uncommon. Such stops often require agents to make quick, on-the-spot decisions to safeguard the President in the presence of large groups of people. Cf. *Scheuer* v. *Rhodes*, 416 U.S. 232, 246-247 (1974) (qualified immunity protects officials who need to "act swiftly and firmly" when faced with "an atmosphere of confusion, ambiguity, and swiftly moving events"). In making such decisions, Secret Service agents face the difficult task of quickly assessing the potential security implications of multifaceted and rapidly evolving factual circumstances. They should not be distracted from those security-related assessments by the threat of personal liability if they fail to ensure comparable proximity to the President or other high-level officials of diverse groups who seek to express competing views.

B. Respondents Did Not Adequately Plead That Petitioners Acted With A Viewpoint-Discriminatory Motive

For the reasons stated above, respondents could not establish a violation of a clearly established constitutional right simply by proving that they were placed farther from the President than a competing group of demonstrators, or even simply by proving that petitioners considered their speech in deciding how far they needed to be from the President. Respondents have attempted to circumvent that qualified-immunity bar by including in their complaint allegations that petitioners moved them solely to suppress a disfavored viewpoint, and not for any security-related reason. In *Ashcroft* v. *Iqbal*, *supra*, this Court held that a complaint alleging discrimination in violation of the First and Fifth Amendments must plead the defendant's discriminatory purpose or intent in factual, nonconclusory terms. 556 U.S. at 676-677, 680-681. The complaint in this case fails to satisfy that standard.

1. The plaintiff in *Iqbal* alleged that certain high-ranking federal officials had "adopted an unconstitutional policy that subjected [him] to harsh conditions of confinement on account of his race, religion, or national origin." 556 U.S. at 666. The Court explained that, in order to avoid dismissal, a complaint alleging purposeful discrimination by a federal official "must plead sufficient factual matter" to show that the official took "a course of action 'because of,' not merely 'in spite of,' the action's adverse effects upon an identifiable group." *Id.* at 677 (brackets and some internal quotation marks omitted) (quoting *Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256, 279 (1979)). The

Court further explained, drawing on its decision in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007), that Federal Rule of Civil Procedure 8(a)(2) requires that such a complaint do more than "plead facts that are 'merely consistent with' a defendant's liability." 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Rather, it must "'state a claim to relief that is plausible on its face'" by "plead[ing] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ibid.* (quoting *Twombly*, 550 U.S. at 570). The Court emphasized that "where the well-pleaded facts do not permit the court to infer more than the mere *possibility* of misconduct, the complaint * * * has not 'show[n] * * * that the pleader is entitled to relief.'" *Id.* at 679 (quoting Fed. R. Civ. P. 8(a)(2)) (emphasis added; brackets added by Court).

The Court found that the particular complaint in *Iqbal* did not satisfy Rule 8(a)(2)'s requirements. 556 U.S. at 687. The Court "beg[an]" its "analysis by identifying the allegations in the complaint that [were] not entitled to the assumption of truth" because they were "conclusory" assertions that "amount[ed] to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." *Id.* at 680-681 (citation omitted); see *id.* at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). The Court accordingly disregarded allegations that, for example, one petitioner had been the "'principal architect'" of a policy subjecting the plaintiff to harsher conditions of confinement based on race or religion, and that the other petitioner was "'instrumental' in

adopting and executing" that policy. *Id.* at 680-681 (citation omitted).

The Court "next consider[ed]" the actual "factual allegations in [the] complaint to determine if they plausibly suggest[ed] an entitlement to relief." *Iqbal*, 556 U.S. at 681. The Court found those allegations—namely, that one petitioner had directed the arrest and detention of "thousands of Arab Muslim men" and that both petitioners had "approved" a "policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were cleared by the FBI"—insufficient to support an intentional-discrimination claim. *Id.* at 681-683 (internal quotation marks and citation omitted). Although those allegations were "*consistent* with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin," they failed to "plausibly establish this purpose," because "more likely explanations" existed. *Id.* at 681 (emphasis added).

2. The complaint in this case alleges that petitioners ordered "all persons" (a viewpoint-neutral category) to be moved from the block adjacent to the outdoor patio for the stated purpose of getting them beyond "handgun or explosive range of the President" (a viewpoint-neutral justification). Pet. App. 177a. Respondents nevertheless assert that petitioners "had no valid security reason to request or order the eviction of [respondents] from the north and south sidewalks of California Street between Third and Fourth Streets," *id.* at 186a, and that petitioners were instead motivated by a desire to discriminate against respondents on account of their expressive activity, *id.* at 183a-185a. In allowing respondents to proceed with

their claim, the court of appeals failed to adhere to the approach set forth in *Iqbal*.

As the court of appeals recognized in rejecting respondents' first amended complaint, a "bald allegation of impermissible motive on [petitioners'] part," or an unsupported "allegation of systematic viewpoint discrimination at the highest levels of the Secret Service," would be "just the sort of conclusory allegation that the *Iqbal* Court deemed inadequate" to sustain a complaint of this sort. 572 F.3d at 970. The rule that such conclusory allegations are insufficient, however, would be of little value in protecting petitioners against unsupported claims if respondents could simply amend their complaint to plead specific facts that, while "consistent with" an inference of unlawful conduct, are "more likely explained by[] lawful * * * behavior." *Iqbal*, 556 U.S. at 680. Rather, to create an inference of unlawful motivation sufficient to defeat a motion to dismiss, respondents must plead specific facts that, taken as true, refute any "obvious alternative explanation" for the defendant's conduct. *Id.* at 682 (citation omitted). In *Iqbal*, the obvious alternative explanation for the plaintiff's detention was that "the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.* at 683. And in *Twombly*, which rejected a complaint alleging an antitrust violation, the obvious alternative explanation to anti-competitive conspiracy was that the defendant companies were simply former government-sanctioned monopolists engaging in parallel but independent conduct, "sitting

tight, expecting their neighbors to do the same thing." 550 U.S. at 568; see *id.* at 548.

Here, in contrast, the court of appeals gave no meaningful weight to the commonsense inference that petitioners, two Secret Service agents charged by statute with protecting the President (see 18 U.S.C. 3056(a)(1)), considered it important to move everyone between Third and Fourth Streets away from the restaurant patio (out of handgun or explosive range) in order to protect the President. Rather, the court stated that, "[a]s this case arises on a motion to dismiss, any explanation for the agents' differential treatment of the pro- and anti-Bush demonstrators would have to be *so obviously applicable* as to render the assertion of unconstitutional viewpoint discrimination implausible." Pet. App. 47a (emphasis added). The practical effect of the court's approach is to preclude dismissal of a *Bivens* complaint whenever an innocent explanation for the defendant's conduct is not obviously the correct one—*i.e.*, whenever an inference of unlawful motivation is "consistent with" the facts alleged in the complaint. But see *Iqbal*, 556 U.S. at 680-682.

In both *Iqbal* and *Twombly*, this Court recognized that a good deal more than that is needed to bring a plaintiff's factual allegations "across the line from conceivable to plausible." *Iqbal*, 556 U.S. at 680 (quoting *Twombly*, 550 U.S. at 570). In particular, when a plaintiff's factual allegations are susceptible to "more likely [innocent] explanations," those allegations "do not plausibly establish [an invidious] purpose." *Id.* at 681. By requiring a defendant to negate any realistic possibility that he acted with an unconstitutional motive, the court of appeals' test all but precludes dis-

missal of a complaint in a case in which the plaintiff alleges an improper motive.

3. Under the standards set forth in *Iqbal*, respondents' complaint fails to state a claim of intentional viewpoint discrimination. Although petitioners' directive to move respondents' group was "consistent with" intentional viewpoint discrimination, the far "more likely explanation[]" for petitioners' actions, *Iqbal*, 556 U.S. at 681, was the security rationale that petitioners actually gave at the time. In concluding otherwise, the court of appeals focused on three sets of allegations that, in the court's view, plausibly showed petitioners' security rationale to be pretextual. Pet. App. 39a-43a. None of those allegations, either separately or in combination, creates a plausible inference of pretext, let alone a plausible inference that petitioners' actions were motivated by a desire to suppress respondents' speech.

First, the court of appeals believed that the complaint alleged sufficient facts from which to infer that respondents "posed no threat to the President" that would require moving them. Pet. App. 39a-40a. The court interpreted the complaint to allege that respondents were not, in fact, in explosive or handgun range at either their original location (between Third and Fourth Streets) or their initial new location (on the east side of Fourth Street); that the alley connecting California Street to the patio where the President was dining was guarded by officers in riot gear; that the terrain included various buildings and a six-foot fence around the patio; and that none of the demonstrators had "attempted to surmount these obstacles to get access to the President." *Id.* at 40a. None of

that plausibly implies that petitioners' security rationale for moving respondents' group was pretextual.

To the extent the complaint alleges that respondents' group was out of handgun or explosive range of the President, respondents' own map refutes those allegations. According to that map, when respondents' group was at its initial location, only about 80 feet of alley separated them from the patio where the President was dining. See Pet. App. 212a. That distance—shorter than the 90-foot distance from home plate to first base on a baseball diamond—was not so great as to eliminate all possibility of danger to the President. Respondents cannot salvage their complaint by making the incredible allegation that it would have been impossible for someone to throw a grenade, or other type of explosive, far enough that its blast radius would endanger the President. Dan Eggen & Michael A. Fletcher, *FBI: Grenade Was a Threat to Bush*, Wash. Post (May 19, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/05/18/AR2005051800470.html (discussing a live grenade with a 65-foot blast radius thrown at President Bush in Tbilisi in 2005 and noting that it could have injured him from 100 feet away had it detonated); see, *e.g.*, 5C Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1363, at 120-121 (3d ed. 2004) ("The district court will not accept as true pleading allegations that are contradicted by facts that can be judicially noticed or by other allegations or exhibits attached to or incorporated in the pleading.") (footnotes omitted); *id.* at 120-121 nn.39-40 (citing cases). Nor can they claim that they were out of handgun or explosive range at the location to which they were initially moved, on the east side of Fourth

Street. As previously discussed, the location at the corner of Fourth and California Streets appears from respondents' map to have had a direct line of sight to the patio. See Diagram B, *supra*.

The presence of police officers in riot gear (who could not have stopped an explosive thrown over their heads) and a wooden fence around the patio (which would not likely have stopped a bullet or an explosive) did not render petitioners' additional security precautions unnecessary. Nor does it suggest pretext that petitioners decided to widen the security perimeter even in the absence of an attempt to breach or circumvent the existing one. No matter how polite respondents' group might have appeared, petitioners had no assurance that it would stay that way. Petitioners also had no assurance that an assailant was not using the group for cover.

If "judges should be cautious about second-guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation," *Ryburn* v. *Huff*, 132 S. Ct. 987, 991-992 (2012) (per curiam), they should be even more so about subjecting Secret Service agents to prolonged litigation based on post hoc judicial assessments about whether the President was sufficiently secure. Cf. *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (declining to read certain First Amendment precedents to "assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained"). That Secret Service agents are being proactive, rather than reactive, in addressing potential

threats to the President cannot be a basis for inferring that their security concerns are pretextual.

Second, the court of appeals focused on petitioners' allegations that, if security concerns had been "the true reason" for moving the anti-Bush demonstrators from their initial location, petitioners would also have required that the pro-Bush group be moved away from the President's post-dinner motorcade route. Pet. App. 178a; see *id.* at 40a-41a. But the security concerns arising from the presence of a large group of people near the open-air patio where the President was dining were plainly different from those associated with permitting a group (like the pro-Bush demonstrators) to remain along Third Street while the President's *motorcade* traveled by. To the extent that a contrary inference might ever be plausible, the complaint alleges no facts to support one. It does not, for example, allege that the President lacked his usual armored limousine, which would have provided considerable protection from any sort of attack. See, *e.g.*, Scott Lindlaw, *In an Election Season, Bush Brings Presidential Pomp*, Laredo Morning Times (Oct. 25, 2004), http://airwolf.lmtonline.com/news/archive/102504/pagea11.pdf ("Bush is driven through cities in an armored, black limou sine with flags flying from the front of the car."); Elisabeth Bumiller, *Inside the Presidency*, National Geographic (Jan. 2009), http://ngm.nationalgeographic.com/2009/01/president/bumiller-text/1 (explaining that cargo planes transport the President's armored limousine from stop to stop); John Pearley Huffman, *The Secret Seven: The Top Presidential Limousines of All Time*, Popular Mechanics (Jan. 20, 2009), http://www.popularmechanics.com/cars/news/vintage-speed/4300349 ("Besides five-inch thick armored doors and bulletproof glass so thick it

blocks out parts of the light spectrum, Bush's DeVille was rumored to feature a self-contained passenger compartment with its own secure air supply, run flat inner cores inside the tires, and a big 454 cubic inch truck engine so the 14,000-or-so pound monster could push through any obstacles.").

Respondents have also alleged (Br. in Opp. 15-17) that, had petitioners truly been interested in the President's safety when they moved respondents, they would "have requested or directed that all persons dining, staying at, or visiting the Inn who had not been screened * * * be removed from the Inn." Pet. App. 178a. Because of serious law-of-the-case concerns stemming from its rejection of similar allegations in the first amended complaint, the court of appeals expressly refrained from relying on these allegations in addressing the sufficiency of respondents' second amended complaint. *Id.* at 43a n.5.[6] But those allegations would not bolster the complaint in any event. The other diners and guests to whom respondents refer were at the Inn before it was known that the President would dine there. Because they

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[6] In its decision finding the first amended complaint insufficient, the court of appeals concluded that "[t]he differential treatment of diners and guests in the Inn, who did not engage in expressive activity of any kind and were not located in the public areas outside of the Inn * * * offers little if any support for * * * an inference" that petitioners were acting with a speech-suppressive motive. 572 F.3d at 971. Notwithstanding circuit law limiting the scope of the remand to issues left open by the circuit court, see *United States* v. *Thrasher*, 483 F.3d 977, 981-982 (9th Cir. 2007), cert. denied, 553 U.S. 1007 (2008), the district court nevertheless "view[ed]" those allegations "somewhat differently than the Ninth Circuit" had and relied on them as supporting the sufficiency of respondents' complaint, Pet. App. 110a.

thus would have had no opportunity to plan to harm the President, those individuals were differently situated from the crowd outside, which had gathered in specific anticipation of being near the President. Petitioners' treatment of the diners thus provides no basis to conclude that the security-based rationale was pretextual or inconsistently applied.

Third, the court of appeals focused on excerpts from a Presidential Advance Manual that were included with the complaint, along with allegations of a widespread Secret Service practice of viewpoint discrimination, as support for an inference of pretext. Pet. App. 41a-42a; see *id.* at 189a-194a, 213a-217a. But the Presidential Advance Manual was, as the court of appeals recognized, "designed to guide the President's political advance team, not the Secret Service." *Id.* at 42a. Furthermore, as Judge O'Scannlain noted, the manual "clearly refers to ticketed presidential events, from which demonstrators can be excluded without violating the First Amendment." *Id.* at 14a (O'Scannlain, J., dissenting from the denial of rehearing en banc); see, *e.g.*, *id.* at 215a-217a (discussing ticket distribution and collection). Indeed, the manual specifically distinguishes between the Secret Service's responsibility for demonstrators who "appear to be a security threat" and the advance team's responsibility for handling demonstrators who "appear likely to cause only a political disruption." *Id.* at 220a. As the complaint acknowledges, the Secret Service has "written guidelines, directives, instructions and rules" that, on their face, "prohibit Secret Service agents from discriminating between anti-government and pro-government demonstrators, between demonstrators and others engaged in expressive assembly,

and between demonstrators and members of the public not engaged in expressive assembly." *Id.* at 184a. The advance-manual excerpts do not plausibly support an inference that the Secret Service's stated policies are a sham.

Neither do the portions of respondents' pleadings discussing other incidents in which Secret Service agents allegedly engaged in viewpoint discrimination. As the dissenters below noted, those alleged incidents did not involve "the same agents or the same circumstances" as this case and "do not show a pattern pervasive enough to establish an unspoken policy of discrimination, especially in light of the explicit Secret Service policy prohibiting such conduct." Pet. App. 13a-14a (O'Scannlain, J., dissenting from the denial of rehearing en banc). None of the other incidents is alleged to have involved petitioners, and most of respondents' capsule descriptions appear to refer to circumstances involving pre-arranged protest zones associated with events where the President was expected to speak, or to protesters who might have disrupted such events, rather than to spur-of-the-moment decisions precipitated by unscheduled stops and multiple groups of differently situated people. See *id.* at 190a-194a. Moreover, it is highly likely that security concerns would provide an "obvious alternative explanation," *Iqbal*, 556 U.S. at 682 (citation omitted), for the Secret Service's actions in most or all of these other alleged incidents. Respondents cannot save their complaint from insufficiency under *Iqbal* simply by concatenating a series of mini-complaints that are themselves insufficient.

4. The context of this case warrants particularly careful adherence to the pleading standards set forth

in *Iqbal* and *Twombly*. This Court has recognized the concern that, "[b]ecause an official's state of mind is easy to allege and hard to disprove, insubstantial claims that turn on improper intent may be less amenable to summary disposition than other types of claims against government officials." *Crawford-El* v. *Britton*, 523 U.S. 574, 584-585 (1998) (internal quotation marks and citation omitted). The Court accordingly suggested, even before *Iqbal* and *Twombly*, that trial courts can weed out insubstantial motive-based cases by "insist[ing] that the plaintiff 'put forward specific, nonconclusory factual allegations' that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment." *Id.* at 598 (citation omitted). That approach, which *Iqbal* and *Twombly* now expressly require, is especially important in cases involving First Amendment claims against Secret Service agents.

Secret Service agents frequently operate in politically charged environments. They protect not only the President and Vice President and their families, 18 U.S.C. 3056(a)(1), but also other political figures such as foreign heads of state (and, potentially, other foreign dignitaries), 18 U.S.C. 3056(a)(5)-(6), as well as presidential and vice-presidential candidates, 18 U.S.C. 3056(a)(7). They also sometimes provide security at "special events of national significance," 18 U.S.C. 3056(e)(1), which can include political activities like major-party presidential nominating conventions. Agents' security decisions will thus often involve expressive activity. If the complaint in this case—which second-guesses the Secret Service agents' stated rationale for establishing a particular security perime-

ter through reliance on disparate-impact allegations, a memorandum to non-Secret-Service personnel, and conclusory allegations of viewpoint discrimination at other times and places—is sufficient to state a claim, then Secret Service agents would have every reason to anticipate a lawsuit whenever their duties require them to control a crowd of demonstrators. As this Court has recognized, however, those who protect the President "should not err always on the side of caution because they fear being sued." *Hunter*, 502 U.S. at 229 (internal quotation marks and citation omitted).

The court of appeals sought to downplay the practical impact of its decision by suggesting that petitioners could yet prevail by refuting respondents' allegations of unlawful motive "[a]fter discovery or trial." Pet. App. 46a. This Court has repeatedly explained, however, that "[t]he basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Iqbal*, 556 U.S. at 685 (quoting *Siegert* v. *Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in the judgment)). "Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." *Ibid.* Here, in a case that has made two trips to the court of appeals, the Secret Service and two of its agents have already borne the burdens of litigation for more than seven years since respondents filed their initial complaint. See 06-cv-03045 Docket entry No. 1 (D. Or. July 6, 2006). Discovery in this case—which could involve inquiry not only into the Secret Service's methods and practices as they

pertain to the relocation of respondents, but also as they pertain to the dozen other instances of viewpoint discrimination that respondents summarily allege—has the potential to be particularly burdensome and disruptive. Wider exposure of the Secret Service's methods and practices could also impede its ability to ensure the safety of its protectees.

Respondents have suggested (Br. in Opp. 11) that, in petitioners' view, "no plaintiff asserting a claim for viewpoint discrimination could survive a motion to dismiss unless the plaintiff could allege that the defendant announced his or her intention to discriminate." That is incorrect. Here, for instance, respondents' entitlement to relief might have been plausible if local law-enforcement officers had said that the Secret Service agents invoked a discriminatory reason for moving the anti-Bush group (rather than the viewpoint-neutral justification they gave); or if the pro-Bush group had then been allowed to move into the nearer location that the anti-Bush group had vacated; or, perhaps, if the other incidents had involved the same agents and were similar in nature to the events here (as opposed to being primarily at ticketed events). Respondents, however, have made no such specific allegations. Accordingly, under well-established pleading standards, their complaint is insufficient.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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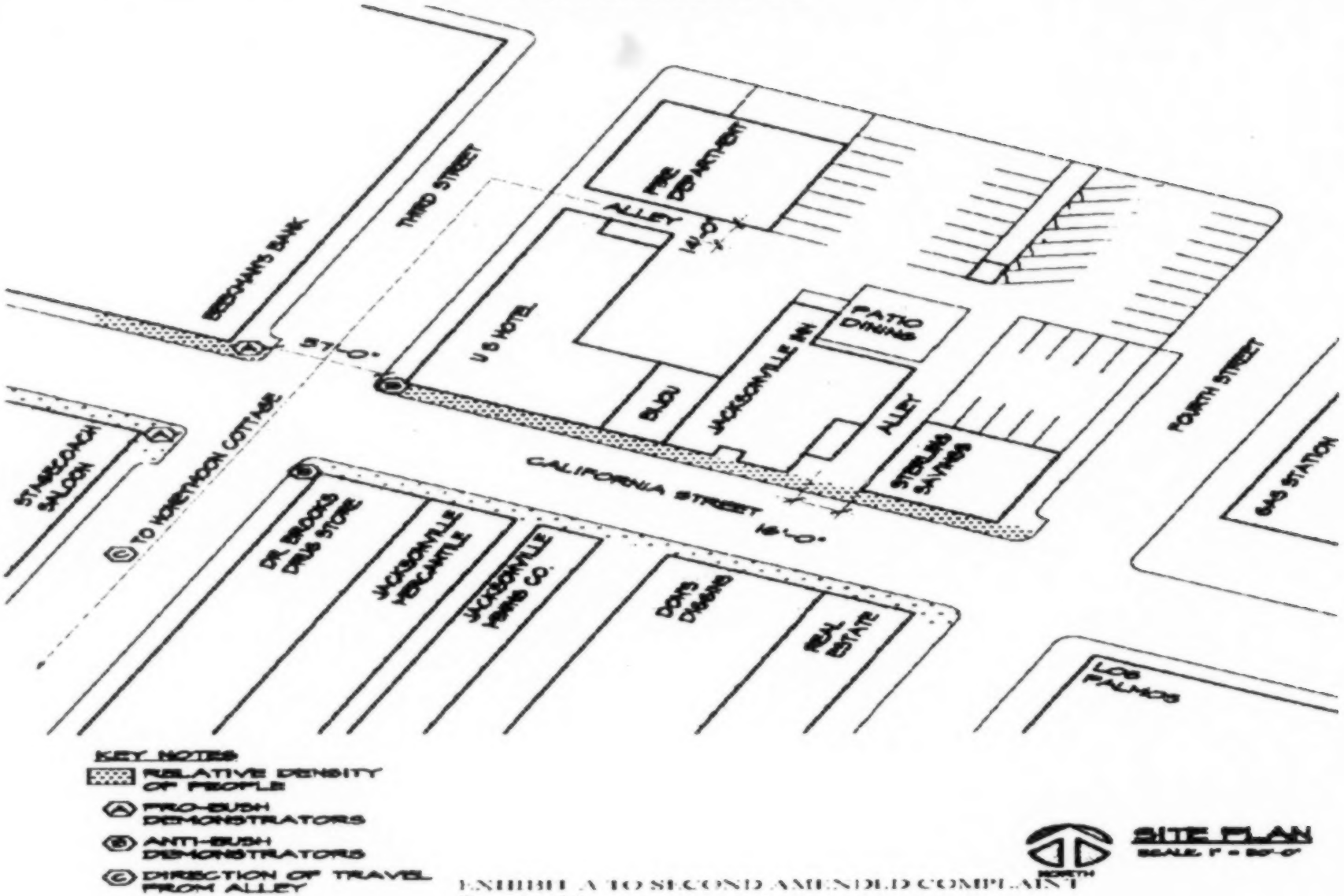
DIAGRAM A



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Source: Pet. App. 212a

DIAGRAM B

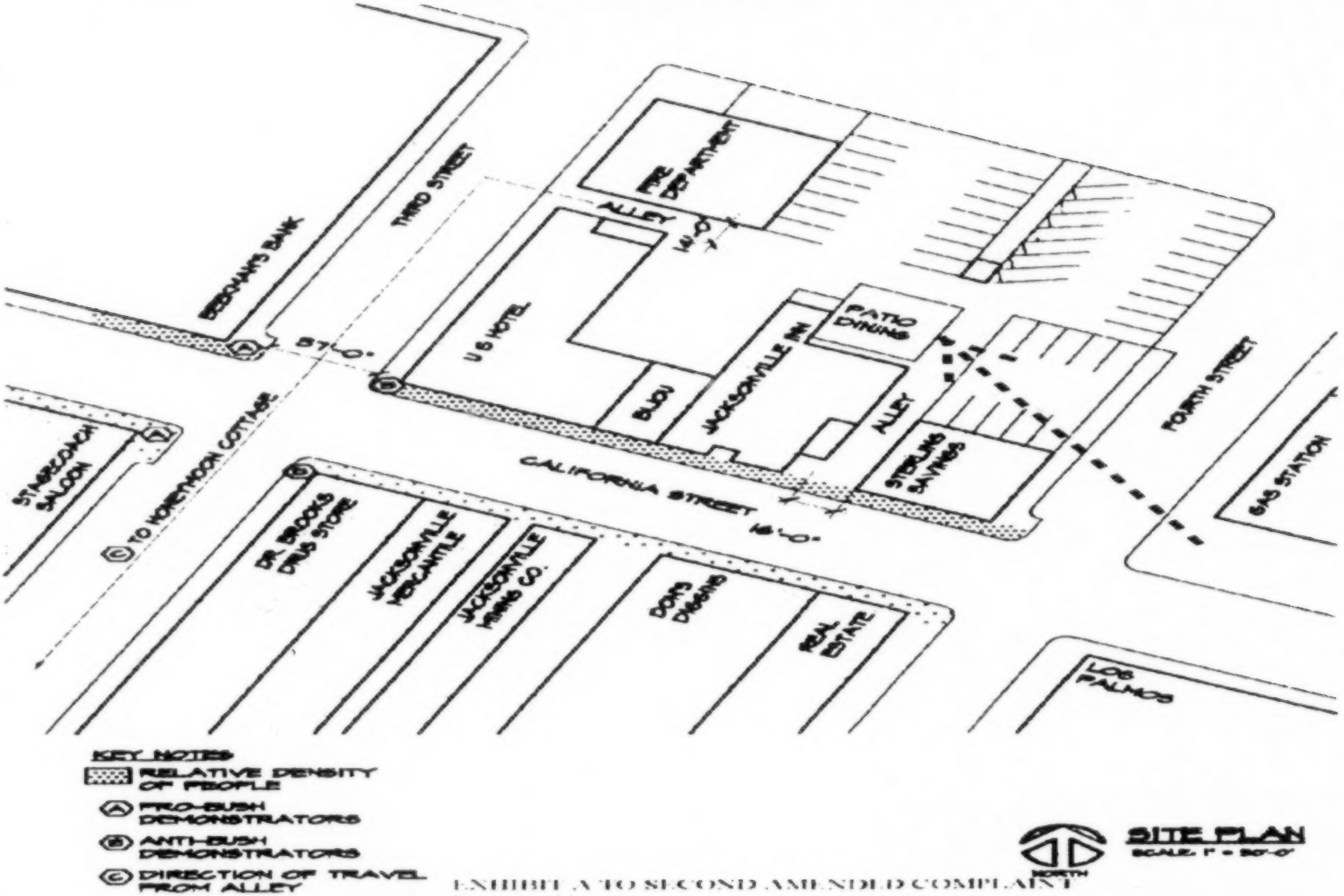

EXHIBIT A TO SECOND AMENDED COMPLAINT
Page 1 of 1

Source: Pet. App. 212a (arrow added)

RESPONDENT'S BRIEF

SECOND
CIRCUIT
BRIEFS

No. 13-115

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In The Supreme Court of the United States

TIM WOOD AND ROB SAVAGE,

Petitioners,

v.

MICHAEL MOSS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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RESTATEMENT OF QUESTIONS PRESENTED

Petitioners' Questions Presented put the cart before the horse. To determine whether qualified immunity is available as a matter of a law in this case, the Court must accept respondents' well-pleaded factual allegations as true for purposes of the motion to dismiss. Thus, the appropriate questions presented are:

1. Whether the court of appeals properly concluded that respondents have sufficiently pleaded a plausible claim for viewpoint discrimination where the Second Amended Complaint alleges facts showing (a) that petitioners ordered respondents to be moved to a position more than twice as far from the President as his supporters for the specific purpose of assuring that respondents' protest message could neither be seen nor heard by the President; (b) that this treatment of respondents was pursuant to a viewpoint-discriminatory policy of the Secret Service, as exemplified by at least a dozen other incidents involving Secret Service agents during the first four years of the administration of President George W. Bush; and (c) that the proffered security rationale for petitioners' actions was pretextual as demonstrated by their treatment of the President's supporters and the other diners and guests at the Inn.

2. Whether the court of appeals properly concluded that petitioners were not entitled to qualified immunity where the factual allegations of the Second

RESTATEMENT OF QUESTIONS PRESENTED – Continued

Amended Complaint, which must be accepted as true on petitioners' motion to dismiss, show that petitioners moved respondents out of sight and sound of the President based only on the viewpoint of respondents' political speech, and not for any legitimate security reason.

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INTRODUCTION

This case was filed more than seven years ago, yet is still at the motion to dismiss stage. The district court and the court of appeals carefully and thoroughly addressed all the arguments presented in support of petitioners' motion to dismiss, correctly applied well-established law to the facts alleged in the Second Amended Complaint, and properly concluded that respondents have sufficiently pleaded a claim for viewpoint discrimination in violation of the First Amendment and that petitioners are not entitled to qualified immunity as a matter of law. Petitioners' brief seeks to substitute their version of the facts for the factual allegations of the Second Amended Complaint, and essentially argues that Secret Service agents can do no wrong as a matter of law. That argument should be rejected, and the decisions below should be affirmed.

STATEMENT OF THE CASE

In October 2004, President Bush was scheduled to make a campaign stop in Jacksonville, Oregon, just weeks before the upcoming presidential election. Pet. App. 172a. When respondents learned of the planned visit, they informed the Jacksonville Chief of Police and the Jackson County Sheriff that they intended to demonstrate in opposition to President Bush and his policies, and indicated that the protest would be multi-generational, with many parents bringing

small children. *Id.* at 172a-173a. Neither the Chief nor the Sheriff raised any objection to the demonstration; they simply advised respondents to stay on the sidewalks and not to obstruct traffic. *Id.* at 173a. Respondents followed those instructions and remained peaceful and law-abiding at all times. *Id.* at 160a, 174a.

At about 5:00 p.m. on October 14th, between two and three hundred anti-Bush protestors, including elderly people, families, children and young infants, gathered in Griffin Park in Jacksonville. *Id.* at 173a. An hour later, the protestors left the park and proceeded to California Street between Third and Fourth Streets, following the route they had pre-cleared with local law enforcement. *Id.* at 174a. They stood in front of the main building of the Jacksonville Inn. *Id.* at 172a, 174a. A similarly-sized group of pro-Bush demonstrators gathered on California Street directly across Third Street. *Id.* at 174a.

Upon learning that the President had changed his plans and intended to dine at the Inn's restaurant rather than at the Honeymoon Cottage, both pro- and anti-Bush demonstrators clustered on opposite corners at the intersection of Third Street and California Street. *Id.* at 175a. In advance of the President's arrival, petitioners (two Secret Service agents, directing the activities of local law enforcement forces) cleared and secured the alleyways adjacent to the Inn. *Id.* at 175a-176a. The demonstrators, both pro- and anti-Bush, however, were allowed to remain where they had gathered as the President's

motorcade passed through the intersection on its way to the restaurant. *Ibid.* At the time the President's motorcade passed through the intersection, the pro- and anti-Bush demonstrators were identically situated for all relevant purposes, "separated only by the 37-foot width of Third Street." *Id.* at 174a.[1]

Once inside the restaurant, the President ate in the patio dining area behind the Inn. *Id.* at 175a, 177a. The demonstrators had no line of sight to the patio restaurant from the sidewalks on California Street, *id.* at 176a, and most of the demonstrators on the north side of California Street were behind the buildings on that side of the street – the United States Hotel, the Bijou, the Jacksonville Inn itself, and the Sterling Savings Bank – completely blocking any line of sight or access to the patio dining area behind the Inn. *Id.* at 176a, 212a. Drawing a reasonable inference in favor of respondents as the non-moving party on the motion to dismiss, the Secret Service agents had concluded that these measures were adequate to protect the President's safety while dining at the Inn.

However, approximately 15 minutes after the President sat down for dinner, when it became clear that respondents' chanting could be heard in the

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[1] A copy of the map attached as Exhibit A to the Second Amended Complaint showing the two groups in relation to the Inn is included in the appendix to the petition. Pet. App. 59a, 212a.

restaurant, petitioners ordered local law enforcement forces to move respondents first one block and then ultimately two blocks further away, to where their message could not heard by the President during dinner and where their protest signs would not be seen by the President when he departed the restaurant after dinner. *Id.* at 177a-178a. The pro-Bush demonstrators were not moved, *ibid.*, and the Inn's other diner's and guests were never subject to any security screening. *Id.* at 178a-179a. A number of guests at the Inn who had not been in the restaurant when the President arrived but who had learned of his presence there came downstairs and entered the restaurant to gawk at the President; they were not screened or prevented from standing within approximately 15 feet of the President. *Id.* at 177a.

As alleged in detail in the Second Amended Complaint, petitioners' actions in this case were taken pursuant to the Secret Service's "unwritten policy and practice" of "work[ing] with the White House under President Bush to eliminate dissent and protest from presidential appearances." *Id.* at 184a; *see also id.* at 181a-182a. There were more than a dozen incidents during the first four years of the Bush Administration, including during his re-election campaign and before the events at issue here, where Secret Service agents reportedly engaged in conduct designed to keep critical protesters and their messages out of sight and sound of the President. *Id.* at 189a-194a. This goal was described in the Presidential Advance Manual, a redacted version of which was attached as

Exhibit B to and referenced in the Second Amended Complaint. *Id.* at 183a-184a, 212a. The relevant portion of the Advance Manual states as follows:

> **Preparing for demonstrators**
>
> There are several ways the advance person can prepare a site to minimize demonstrators. First, as always, *work with the Secret Service* and have them ask the local police department to designate a protest area where demonstrators can be placed; preferably not in view of the event site or motorcade route.

Id. at 183a, 218a-219a (emphasis added).

Respondents filed this action in July 2006, alleging, among other claims, that they were subjected to unconstitutional discrimination based on their viewpoint – specifically, their opposition to President Bush – when they were removed from the vicinity of the Jacksonville Inn by the use of constitutionally excessive force.[2] After the district court ruled on defendants' motions to dismiss or for summary judgment against the First Amended Complaint in 2007, the federal defendants (petitioners here) appealed the partial denial of their motion to dismiss and also sought to appeal the district court's constructive denial of their motion for summary judgment. On

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[2] The excessive force claims were asserted against state and local law enforcement defendants, and are not involved in this appeal.

review, the Ninth Circuit, relying on the decisions of this Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (decided after argument in the district court on the motions to dismiss), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (decided after argument in the Ninth Circuit), concluded that the First Amended Complaint did not meet the new heightened pleading standard that had been announced in *Twombly* and expanded upon in *Iqbal*. *Moss v. United States Secret Service*, 572 F.3d 962, 971-72 (9th Cir. 2009). Because the pleading standard was new, the Ninth Circuit granted respondents leave to replead. *Id.* at 972. Following remand, respondents filed their Second Amended Complaint, alleging additional factual content to demonstrate the plausibility of their claims.

Petitioners moved to dismiss the Second Amended Complaint. The district court (adopting the Report and Recommendation of a Magistrate Judge) denied petitioners' motion to dismiss respondents' claims for violations of the First Amendment, finding that the Second Amended Complaint "meets the stricter pleading standards imposed by *Twombly* and *Iqbal*" and that petitioners "have not shown, at least at this stage of the litigation, that they are entitled to qualified immunity." Pet. App. 61a; *see id.* at 89a-121a.

On appeal, the Ninth Circuit affirmed, finding respondents' allegations

> that, at the direction of the Secret Service agents, they were moved to a location where they had less opportunity than the pro-Bush

> demonstrators to communicate their message to the President and those around him, both while the President was dining at the Inn and while he was en route to the Honeymoon Cottage . . . support a plausible claim of viewpoint discrimination.

Id. at 38a. The court of appeals also found that the specific allegations of a dozen similar incidents involving the Secret Service as well as the allegations regarding how respondents' treatment corresponded to the instructions in the Presidential Advance Manual demonstrated the plausibility of respondents' allegations that petitioners acted with an impermissible discriminatory motive. *Id.* at 42a-43a. As the court of appeals explained:

> The protestors' allegations that the agents' conduct in this case accords with viewpoint discriminatory practices instituted in other, similar, circumstances and encouraged by the President's Advance Manual support the plausibility of the inference that, in this case, the Secret Service agents directed that the anti-Bush protestors be moved because of their viewpoint.
>
> In sum, the anti-Bush protestors have pleaded nonconclusory factual allegations that they were treated differently than the pro-Bush demonstrators; that any security-based explanation for this differential treatment offered by the Secret Service agents was pretextual; and that the agents' directives in this case accord with a pattern of

> Secret Service action suppressing the speech of those opposed to the President. These allegations, taken together, are sufficient to allow the protestors' claim of viewpoint discrimination to proceed.

Ibid. (footnote omitted).

The court of appeals then rejected petitioners' qualified immunity defense, finding that "it is clear that no reasonable agent would think that it was permissible under the First Amendment to direct the police to move protestors farther from the President because of the critical viewpoint they sought to express." *Id.* at 45a; *see ibid.* (finding it "'beyond debate' that, particularly in a public forum, government officials may not disadvantage speakers based on their viewpoint") (quoting *Ashcroft v. al-Kidd*, 563 U.S. ___, 131 S. Ct. 2074, 2083 (2011)).

Petitioners' petition for rehearing en banc was denied over the dissent of eight judges who essentially concluded that allegations of misconduct by Secret Service agents are either inherently incredible or must be rejected as a matter of law in order to protect the President. Pet. App. 8a-23a. After dismissing the well-pleaded allegations of the Second Amended Complaint in favor of the inferences sought by the agents (and some hypothesized solely by the dissenting judges), the dissent concluded that the panel had focused its analysis on an overly broad characterization of the right at issue, and that the proper characterization of the right at issue was (1) "was it clearly established that moving one group

to a location one block farther from the President than another when creating a presidential security perimeter constituted a violation of that group's First Amendment rights?" and (2) "was it clearly established that Secret Service agents, who moved a group to maintain a consistent security perimeter around the President, had to move the group back to their original location before the President could leave in his motorcade (or at least had to alter the motorcade route so that all involved got an equal chance to see the President)?" Pet. App. 18a. The dissent answered these questions with "a clear 'no.'" *Ibid.* However, respondents have never asserted such rights, and the dissent's statement of the issues – echoed by petitioners here – explicitly assumes facts contrary to the factual allegations of the Second Amended Complaint. *Id.* at 18a-20a.

SUMMARY OF ARGUMENT

Petitioners' brief rests on two fundamentally flawed arguments. First, they seek review from the denial of a motion to dismiss based on facts outside the complaint and based on inferences favorable to them rather than to the non-moving party. Second, after mischaracterizing respondents' First Amendment claim, they ask this Court to analyze the issue of qualified immunity at too low a level of generality.

This Court has repeatedly held that government actors cannot discriminate against speakers based on

the viewpoint of their speech. To determine whether that clearly established principle of law applies in this case, the Court should first examine the constitutional violation claimed by respondents and then determine whether the court of appeals evaluated the qualified immunity defense at the correct level of specificity. Properly characterized, respondents' claim for viewpoint discrimination in violation of the First Amendment rests on clearly established law; petitioners reach the opposite conclusion only by re-characterizing respondents' claim in a manner inconsistent with the Second Amended Complaint.

Respondents have complied with the pleading requirements of *Twombly* and *Iqbal* and alleged a plausible claim for viewpoint discrimination in violation of the First Amendment. They did not merely satisfy those pleading standards, they embraced them. Respondents provided substantial factual detail and context, specifically alleging facts demonstrating that (1) respondents were treated differently than similarly situated pro-Bush demonstrators, and (2) the differential treatment was the result of intentional viewpoint discrimination and not security concerns. These detailed factual allegations regarding the differential treatment respondents received and demonstrating how the security rationale proffered by petitioners is undermined by their treatment of the pro-Bush demonstrators as well as the diners and other visitors at the Inn are sufficient to state a plausible claim for relief. The plausibility of respondents' claim is further supported by their allegations

regarding how petitioners' actions were in accord with the actual policy and practice of the Secret Service to suppress or assist in the suppression of viewpoints critical of President Bush. The Second Amended Complaint alleges a dozen other incidents involving Secret Service agents directing or facilitating the suppression of viewpoints critical of President Bush and/or ensuring that those opposed to the President were out of sight or sound from the President. One or two incidents might be coincidence; a dozen (or more) is a pattern from which an unwritten policy can be inferred. That is particularly true, here, where it was the official policy of the White House to work with the Secret Service to suppress dissenting viewpoints at the President's public appearances. The plausibility of respondents' claim is also reinforced by the timing of the events. It was not until 15 minutes after the President was seated in the dining area and the chants of respondents could be heard that the agents directed the removal of respondents.

The Second Amended Complaint alleges that petitioners had respondents pushed two blocks away, to where the President could not hear them during dinner or see them as he drove away from the Inn, while leaving the pro-Bush crowd in place, *because of* the message of respondents' speech. Any reasonable official in petitioners' position would have known in 2004 that such viewpoint-based discrimination was unconstitutional. The proposition that actively suppressing peaceful speakers in a public forum specifically

because of their viewpoint violates the First Amendment should be obvious to everyone.

The principle of viewpoint neutrality applies to Secret Service agents as well as other government officials; there is no Secret Service exception to the First Amendment, and Presidential appearances are not First-Amendment-free zones. To the contrary, federal courts have recognized for decades that, as a matter of well-established law, it is clear that government agents may not override the First Amendment merely to shield the President or Vice-President from peaceful dissent at public events. Courts have been vigilant in condemning such conduct as unconstitutional.

The issue in this case is whether Secret Service agents can treat different groups of demonstrators differently *because* of their differing viewpoints, and *without* a valid security reason, as the Second Amended Complaint alleges that petitioners did here. There is no dispute about the well-established legal principle that governmental actors violate the First Amendment when they discriminate against individuals exercising First Amendment rights in a public forum because of their disfavored political views. The court of appeals and district court correctly applied that well-established principle to the facts alleged in the Second Amended Complaint. The absence of another case with identical or nearly-identical facts therefore does not entitle petitioners to qualified immunity.

Petitioners' proposed qualified immunity inquiry suffers from two major defects: (1) it assumes that the facts are as petitioners would have them, contrary to the Second Amended Complaint, and (2) it is so narrow a statement of the issue that only a case involving virtually identical facts could ever come within the rule announced by a decision in this case. As the court of appeals noted, petitioners "inaccurately characterize[d] both the protestors' allegations and the governing law"; improperly restated respondents' factual allegations about the distances between the two groups of protestors; ignored "the allegation that the pro-Bush demonstrators were permitted to remain along the President's motorcade route, while the anti-Bush protestors were kept away"; and, fundamentally, ignored the crucial fact that "the protestors' claim is not simply that they were moved, but that they were relocated *because* they criticized the President." Pet. App. 44a-45a (emphasis in original). The defects in petitioners' arguments have not changed here.

A case with identical facts is not required to survive a qualified immunity defense where, as here, the application of a well-established legal principle to the facts alleged in the complaint is unmistakably clear. This case does not involve the courts or respondents second-guessing any urgent security determination by petitioners. It was only after the President was seated in the dining area, and the anti-Bush protestors' chants could be heard that petitioners ordered local police to move respondents two blocks away to a

location where their protest message could not be heard (or heard as well) by the President during dinner and where their protest signs would not be seen by the President when he departed the restaurant after dinner.

Because this case involves an appeal from the denial of a motion to dismiss, all facts and reasonable inferences must be viewed in the light most favorable to respondents. It is inappropriate for petitioners to attempt to rewrite or recharacterize respondents' factual allegations, or to argue that the evidence will support a different version of events at trial.

ARGUMENT

The decision below should be affirmed because the court of appeals faithfully applied this Court's recent precedents regarding the sufficiency of the allegations of a complaint, and applied well-established law regarding qualified immunity in permitting respondents to go forward with their case.

There are two fundamental flaws in petitioners' argument. First, they ask this Court to decide this appeal from the denial of a motion to dismiss based on facts outside the complaint and inferences favorable to them rather than to the non-moving party.[3]

[3] The qualified immunity defense in this case cannot properly be assessed without first accepting the plausible, nonconclusory factual allegations contained in the Second Amended

(Continued on following page)

Second, they mischaracterize respondents' First Amendment claim and then ask this Court to analyze the issue of qualified immunity at too low a level of generality. No earlier decision of this Court regarding the intersection of Third and California Streets in Jacksonville, Oregon, is needed to inform a competent Secret Service agent that pushing peaceful protesters out of sight and sound of the President for purely political reasons violates the First Amendment.

I. The Second Amended Complaint Pleads A First Amendment Claim That Is More Than Plausible.

In finding that the Second Amended Complaint meets the "plausibility" standard articulated in *Twombly* and *Iqbal*, the court of appeals properly found that the gravamen of respondents' claim is that the petitioners ordered respondents moved from where they were demonstrating, not for the security reasons they offered, but to minimize the President's exposure to the opposition views that respondents were expressing.

Complaint. For that reason, it makes logical sense to begin with the sufficiency of the pleadings. That approach (which was followed below) is consistent with the reasoning of *Pearson v. Callahan*, 555 U.S. 223 (2009), and is certainly not foreclosed by it, although the Court can and should reach the same result regardless of where it starts the analysis.

As this Court explained in *Iqbal*:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." [*Bell Atlantic Corp. v. Twombly, supra,* 550 U.S.] at 570. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.*, at 556. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557 (brackets omitted).

556 U.S. at 678.

Respondents did not merely satisfy that pleading standard, they embraced it. They provided substantial factual detail and context regarding the events of October 14, 2004. The Second Amended Complaint specifically alleges facts demonstrating that (1) respondents were treated differently than similarly situated pro-Bush demonstrators and (2) the differential treatment was the result of intentional viewpoint discrimination and not security concerns. These are not conclusory allegations. Rather, they are supported by detailed factual allegations regarding the differential treatment respondents received, and

demonstrating how the security rationale proffered by petitioners is undermined by their treatment of the pro-Bush demonstrators as well as the diners and other visitors at the Inn. Pet. App. 177a-179a.

Further, in paragraphs 82(a) to (l) of the Second Amended Complaint, respondents specifically allege in detail twelve other instances during the first term of the George W. Bush administration where the Secret Service engaged in conduct designed to keep critical protesters and their messages away from the President. The complaint also describes how the actions of petitioners here were like the actions of Secret Service agents in those other instances and were taken pursuant to the White House strategy as expressed in the Presidential Advance Manual to limit the President's exposure to dissenting views. *Id.* at 183a-184a, 189a-194a. As the court of appeals found, those allegations further support the plausibility of respondents' claim that petitioners' actions in this case reflected a decision to shield the President from respondents' unwelcome message while he was dining, rather than any legitimate security concern. *Id.* at 42a.

Petitioners dismiss the significance of these allegations. The most they are willing to concede is that respondents' claim of viewpoint discrimination "might have been plausible" if the Second Amended Complaint alleged that

> local law enforcement officers had said that the Secret Service agents invoked a discriminatory

> reason for moving the anti-Bush group (rather than the viewpoint-neutral justification they gave); or if the pro-Bush group had then been allowed to move into the nearer location that the anti-Bush group had vacated; or, perhaps, if the other incidents had involved the same agents and were similar in nature to the events here (as opposed to being primarily at ticketed events).

Brief for Petitioners at 52. If petitioners' view is accepted, a plaintiff asserting a claim of viewpoint discrimination (or any other claim requiring intent) would rarely, if ever, survive a motion to dismiss unless the plaintiff could allege that the defendant had publicly declared his or her intention to discriminate on the basis of the plaintiff's viewpoint. Any such confession would be powerful evidence, to be sure. But it is not, and never has been, the only way that discriminatory intent can be shown. *See* p. 26 below.

The same is true for petitioners' suggestion that an allegation that anti-Bush demonstrators had been displaced in favor of pro-Bush demonstrators might have plausibly supported a claim of viewpoint discrimination. Contrary to petitioners' contention, respondents need not allege that the pro-Bush demonstrators were given respondents' prior space to sufficiently allege that respondents were treated differently based on the viewpoint of their speech. Leaving the pro-Bush supporters in place while moving respondents out of sight and sound of the President

because of their message violates the First Amendment, regardless whether the pro-Bush supporters were allowed to take respondents' former position.

Finally, the other incidents alleged in the complaint were in fact similar in that each involved Secret Service agents directing or facilitating the suppression of viewpoints critical of President Bush and/or ensuring that those opposed to the President were out of sight or sound of the President. That petitioners were apparently not involved in the other incidents, and that some of the other incidents involved "ticketed events," is of no moment.[4] The allegation here is that petitioners acted pursuant to the actual policy and practice of the Secret Service as demonstrated by these other incidents of viewpoint suppression involving the Secret Service. These other similar incidents are sufficient to demonstrate the plausibility of respondents' allegations that petitioners acted with an improper discriminatory intent.

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[4] In the context of presidential appearances, a "ticketed event" does not necessarily mean an event attended only by a selected audience. Tickets are often distributed to the general public by Members of Congress, federal agencies, or local officeholders. *See, e.g., Rank v. Jenkins*, Civ. A. No. 2:04-0997, 2006 WL 515533 (S.D. W.Va. Feb. 28, 2006). In *Rank*, the court noting that the plaintiff in an earlier case involving the removal of protestors from a public presidential appearance had obtained tickets from "her employer, the Federal Emergency Management Agency," and that "[t]he tickets provided that patrons would be seated on a first come, first served basis, without regard to either political affiliation or affinity with the President or his policies." *Id.* at *1.

Neither *Iqbal* nor *Twombly* requires a rule so carefully designed to assure that the truth shall never be known. Rule 9(b) of the Federal Rules of Civil Procedure specifically provides that: "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." *Iqbal* did not, and could not have, repealed that rule. Nevertheless, respondents have done far more than Rule 9(b) requires; the allegations of the Second Amended Complaint provide a more than sufficient basis to support a claim of intentional viewpoint discrimination.

A. Respondents were treated differently than the similarly situated pro-Bush demonstrators.

The non-conclusory factual allegations of the Second Amended Complaint demonstrate that respondents were for all relevant purposes similarly situated to the pro-Bush demonstrators on October 14, 2004, but only respondents were forcibly moved to a location more than twice as far from the Inn.

Specifically, before the Secret Service directed the removal of the respondents, the two groups of demonstrators were not even one block apart; they were all on the California Street sidewalks, "separated only by the 37-foot width of Third Street." Pet. App. 174a. Moreover, because the California Street buildings blocked the Jacksonville Inn's rear-patio from both the pro- and anti-Bush demonstrators on California

Street, none of them had access or a line of sight to the patio or the President. *Id.* at 176a, 212a.

Indeed, the westernmost portion of the pro-Bush demonstrators and the easternmost portion of the anti-Bush demonstrators were effectively identically situated for security purposes; both groups were at the corner of Third and California Streets. The individuals on both sides of Third Street were in positions of greater proximity to the President than other members of their respective groups. *Id.* at 212a. They were within a few feet of the President's limousine as it passed that corner when the President was arriving at the Inn, and again would be within a few feet of his limousine on the President's departure from the Inn en route to the Honeymoon Cottage where he was spending the night. *Id.* at 175a, 179a, 188a, 212a.

As already noted, both groups had no access or line of sight to where the President was dining. Most of the respondents were immediately adjacent to a solid line of buildings (the United States Hotel, the Bijou, and the Jacksonville Inn) on the north side of California Street, between themselves and the President. *See id.* at 212a. A few were immediately adjacent to the Sterling Bank, which was likewise between themselves and the President. *See ibid.* The alley between the Jacksonville Inn and the Sterling Bank had been cleared and secured. *Id.* at 175a-176a. To the extent that there was any concern about demonstrators on the sidewalk outside the mouth of that alley, moving them a few steps east or west so

that they were behind the adjacent buildings would eliminate that concern.

Petitioners rely heavily on the map showing a line of sight from the northeast corner of California Street and Fourth Street to the patio dining area. *See* Brief for Petitioners at 7. But this is a red herring, because *no demonstrators were at that location until petitioners moved them there*. Even if there were legitimate security concerns about allowing demonstrators to gather at Fourth and California, that was a reason for leaving the demonstrators where they were, not for moving them.

After respondents were moved beyond Fourth Street to east of Fifth Street, nearly two blocks away from the Inn, respondents were significantly further from the President than the pro-Bush demonstrators. Pet. App. 177a. At their new site, respondents could not be heard or heard as well by the President while he was dining and could not be seen by the President when his motorcade left the Inn. *Id.* at 177a, 178a, 212a; *see also id.* at 37a ("it is a plausible inference from the facts alleged that the protestors' chants would be less intelligible from two blocks away").

B. The forcible relocation of respondents was the result of intentional viewpoint discrimination; it was not the result of petitioners' pretextual security rationale.

Petitioners' principal argument is that the allegations of viewpoint discrimination are not plausible

given petitioners' assertion that their actions were motivated by legitimate security concerns. After reviewing the record, however, the court of appeals properly found that it was petitioners' explanation that strained credulity, accepting, as it was required to do, the factual allegations in the Second Amended Complaint.

Specifically, the security rationale offered by petitioners is belied by their treatment of both the pro-Bush demonstrators and the diners and other visitors at the Inn. If preventing people from being in a position to harm the President had been petitioners' real concern, there would have been no need to move the demonstrators at all, as the President was well protected by a line of buildings. Instead, it is entirely plausible to believe on the well-pleaded facts in this complaint that the real purpose and effect of petitioners' action was to leave "the pro-Bush demonstrators on the Northwest and Southwest corners of Third and California Streets to cheer for President Bush as he traveled to the Honeymoon Cottage [after dinner], while causing the anti-Bush demonstrators to be violently moved two blocks east, well out of the President's view [or hearing, both during and after dinner]." *Id.* at 178a.

Moreover, that respondents were on the east side of the 37-foot separation between the groups did not make respondents a greater security risk; it was irrelevant for the professed security purpose, because neither assemblage was in handgun or explosive range of the President while he was dining at the Inn.

Id. at 176a. Petitioners' hypothesis that someone either in respondents' group or using the group as a cover might have been in a position to toss a grenade or use some other military weaponry from the California Street sidewalk misses the point. Petitioners' Brief at 44. If proximity to the President was the cause of the agents' concern, they would have done far more to screen those individuals who were far closer to the President than respondents. These concrete facts undermine the security rationale offered by petitioners, and strongly support the proposition that the real reason for moving respondents was to prevent or diminish the expression of their opposition views within the President's sight and hearing. Pet. App. 178a-179a.

Petitioners seek to avoid this obvious conclusion by isolating each of respondents' allegations and asserting that each allegation by itself is insufficient to demonstrate the plausibility of respondents' claim. But the differential treatment of the anti-Bush protestors must be considered in the context of the other allegations, including the non-conclusory allegations regarding other incidents of viewpoint suppression involving the Secret Service during President Bush's Administration and the official policy of the Bush Administration to suppress dissenting viewpoints at events attended by the President with the assistance of the Secret Service. Pet. App. 183a-184a, 189a-194a. Moreover, petitioners fail to address why someone intent on doing harm would not more likely conceal himself or herself among a group of the President's

supporters, particularly given the reports about the Administration's efforts to suppress dissenting viewpoints and to keep protestors at a distance from the President.[5]

Likewise, the allegation that petitioners acted in accord with the actual policy and practice of the Secret Service is not merely an allegation consistent with liability, it is a specific, non-conclusory allegation of fact demonstrating an improper discriminatory motive in light of the allegations of other incidents of viewpoint suppression involving the Secret Service. Petitioners quarrel with the similarity of the other incidents. But, a fair reading of the allegations regarding those dozen other incidents demonstrate that each involved Secret Service agents directing or facilitating the suppression of viewpoints critical of President Bush and/or ensuring that those opposed to the President were out of sight or sound from the President. Pet. App. 189a-194a. Likewise, petitioners' argument that the earlier incidents involved different agents proves nothing; respondents' allegation is not

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[5] The suggestion by petitioners and *amici* National Conference of State Legislatures, *et al.*, that it is acceptable for Secret Service agents to consider those who oppose a president's policies in a *non-threatening* way to be more dangerous than those who support his policies strikes at the heart of the First Amendment. Brief for Petitioners at 32-34; Brief for National Conference of State Legislatures, *et al.* at 18-22. Should all of the *amicus* mayors, sheriffs and state legislators who are not members of the President's party be kept further away from the President than politicians of the President's party when he visits their territories?

that the petitioners here were rogue agents but that they were acting in accordance with Secret Service policy; the fact of similar incidents involving many other agents supports the plausibility of that policy.

After a trial, a jury can infer motive from actions and facts; that is how motive is usually established. *Cf. Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive."); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination."); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.").

If motive cannot be pleaded generally as provided in Rule 9(b) of the Federal Rules of Civil Procedure and cannot be inferred from the factual allegations concerning the incident at issue and from the factual allegations concerning the context of the incident as

one among many involving the Secret Service and the official policy of the President's administration, then there is virtually no circumstance in which a plaintiff could survive a motion to dismiss in the absence of an agent unguarded enough to incriminate him or herself to the plaintiff or a third party. In effect, Secret Service agents will be clothed with a conclusive presumption of lawful behavior. Neither *Twombly* nor *Iqbal* requires such a draconian and counterfactual result.

C. Petitioners' treatment of the diners, guests, and other visitors at the Inn also undermines their asserted security rationale.

Prohibiting expressive activity "while at the same time allowing conduct completely unrelated to the First Amendment, yet equally annoying [or equally threatening to security], to continue unabated . . . stands the First Amendment on its head." *Pursley v. City of Fayetteville*, 820 F.2d 951, 956 (8th Cir. 1987). The Second Amended Complaint alleges facts explaining why the petitioners' failure to screen or remove the guests and diners inside the Inn further supports respondents' allegation that suppression of opposition views was the true reason respondents were moved. Pet. App. 177a, 178a. As the district court found,

> The threat to the President's security here, as implied by the security rationale, came simply from the *proximity* of persons to

> the President. . . . The[ ] proximity [of the diners and guests] to the President makes them a part of the security problem, political views notwithstanding. They received different and, arguably, better treatment than the anti-Bush demonstrators as shown by the fact that they were neither relocated nor screened.
>
> That the diners and guests were not expressing a political view is immaterial to the fact that their proximity made them a potential threat to the President's safety.

Id. at 112a-113a.

The fact that those inside the Inn were not in a public area exercising First Amendment rights made them *more*, not *less*, susceptible to security restrictions. And surely they posed a greater risk of assaulting the President with a handgun or explosive – or even with a thrown steak knife or wine bottle – than the anti-Bush demonstrators outside the Inn, separated from and blocked from even seeing the President by the Inn itself, the other buildings on California Street, and the six foot tall fence surrounding the dining patio. *Id.* at 176a. "'Freedom of expression . . . would rest on a soft foundation indeed if government could distinguish' between demonstrators and pedestrians on 'a wholesale and categorical basis,' without providing evidence that demonstrators pose a greater risk to identified government interests than do pedestrians." *Lederman v. United States*, 291 F.3d 36, 45 (D.C. Cir. 2002) (quoting *Police Dept. of*

Chicago v. Mosley, 408 U.S. 92, 101 (1972)) (ellipsis by the court of appeals).

Petitioners argue that "the other diners and guests . . . were at the Inn before it was known that the President would dine there. Because they thus would have had no opportunity to plan to harm the President, those individuals were differently situated from the crowd outside, which had gathered in specific anticipation of being near the President." Brief for Petitioners at 47-48. This is wrong for four reasons. First, as petitioners' *amici* point out, "Oregon is a 'shall-issue' concealed-carry state." Brief of National Conference of State Legislatures, *et al.* at 12 n.4. Thus, it was entirely possible that a person sitting at the table next to the President carried a handgun in his shoulder holster as a matter of course. Second, the Second Amended Complaint alleges that people who were upstairs at the Inn learned of the President's presence and came down to gawk, coming within 15 feet of the President. Pet. App. 177a. Such individuals had every opportunity to arm themselves – if they were not already armed – if they wished to harm the President. Third, use of a firearm is not the only way to harm a person; a diner having a T-bone steak at an adjacent table would have had a sharp knife within a few feet of the President. Finally, it is simply not true that the demonstrators "had gathered in specific anticipation of being near the President." They had anticipated being at least two blocks away from the President. *Id.* at 172a. His arrival at the Jacksonville Inn was as much a surprise to them as to the diners

at the Inn. Petitioners' attempt to justify their very different treatment of the diners and guests at the Inn on security grounds is not credible.

The differing treatment of the anti-Bush protestors from the President's supporters and the diners and guests at the Inn shows – not just plausibly, but persuasively – that the petitioners' "handgun and explosive range" security rationale was false. The demonstrators were entirely peaceful; the local police were fully in control of the situation; petitioners were not responding to unrest or an emergency situation. *Id.* at 186a-187a. The court of appeals and the district court correctly concluded that the security rationale did not explain the differential treatment of respondents and that respondents had plausibly stated a claim for viewpoint discrimination.[6]

D. The timing of petitioners' actions reinforces the plausibility of respondents' allegations.

Petitioners had at least 20 minutes from the time the President decided to dine at the Inn to assess the security situation and secure the area, and they did so. *Id.* at 186a. After the President sat down to

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[6] The facts alleged in the Second Amended Complaint also state plausible claims for content discrimination and discrimination against expression in violation of the First Amendment. Pet. App. 185a-186a. Neither the district court nor the court of appeals addressed these claims directly in their decisions.

dinner, another 15 minutes passed before any decision was made to move respondents. *Id.* at 177a. Nothing had changed from a security point of view (except, perhaps, the entry of unsecured gawkers into the dining area); it was only when respondents' chants and slogans could be heard where the President was dining that the decision was made to move respondents two blocks away. *Ibid.*

II. The Court Of Appeals Correctly Held That Petitioners Are Not Entitled To Qualified Immunity.

Petitioners contend that the Ninth Circuit erred in analyzing the issue of qualified immunity at too high a level of generality. That is incorrect. Their argument is premised on their factual assertion – contrary to the allegations of the Second Amended Complaint – that they did not treat respondents differently (or differently enough) based on the viewpoint of their speech. Such factual disputes are not appropriate for resolution on a motion to dismiss (or even a motion for summary judgment). *See Scott v. Harris*, 550 U.S. 372, 378-80 (2007) (when a defendant raises qualified immunity on summary judgment, the court must "adop[t] . . . the plaintiff's version of the facts" unless "no reasonable jury could believe it"); *Johnson v. Jones*, 515 U.S. 304, 313-15 (1995) (limiting interlocutory appellate review of qualified immunity decisions to questions of law, not evidence sufficiency).

A. The First Amendment's requirement of viewpoint neutrality is well established and undisputed.

"Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828 (1995). The Second Amended Complaint alleges that petitioners had respondents pushed two blocks away, to where the President could not hear them (or hear them as well) during dinner or see them as he drove away from the Inn, while leaving the pro-Bush crowd in place, *because of* the message of respondents' speech. Any reasonable official in petitioners' position would have known in 2004 that such viewpoint-based discrimination was unconstitutional:

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Id. at 828-29 (citations omitted). *See also Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642-43 (1994) (discrimination based on viewpoint violates

the First Amendment); *R.A.V. v. St. Paul,* 505 U.S. 377, 382 (1992) (same); *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) (same); *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95-96 (1972) (same).

The proposition that treating speakers in a public forum unequally because of their views – intentionally disadvantaging those whose views are critical of government while advantaging those whose views are favorable to government – violates the First Amendment "should be and is obvious to everyone." *Metro Display Adver., Inc. v. City of Victorville*, 143 F.3d 1191, 1196 (9th Cir. 1998) (rejecting defendants' argument that the unconstitutionality of viewpoint discrimination was not clearly established in the context of rejecting advertisements on bus shelters because their viewpoint was disfavored by the Mayor). Petitioners do not dispute that the principle of viewpoint neutrality is well established in the context of government regulation of First Amendment activity in a public forum.

B. Secret Service agents are not exempt from the First Amendment.

Presidential security is not a mantra that, once uttered, permits government agents to censor the message of peaceful protesters based on the views they express. The principle of viewpoint neutrality applies to Secret Service agents as well as other government officials; there is no Secret Service exception to the First Amendment.

More than 35 years ago, the D.C. Circuit noted: "The congressional grants of authority to the Secret Service to protect the President, and to control access to temporary presidential residences, cannot be said to authorize procedures or actions violative of the Constitution." *Sherrill v. Knight*, 569 F.2d 124, 128 n.14 (D.C. Cir. 1977) (internal citations omitted). Citing *A Quaker Action Group v. Hickel*, 421 F.2d 1111 (D.C. Cir. 1969), the *Sherrill* court went on to "reassert our conclusion in that case that we cannot agree with the Government's argument that mere mention of the President's safety must be allowed to trump any First Amendment issue." *Sherrill*, 569 F.2d at 128. The *Sherrill* court's statement was as true at the time of the events at issue here as it was in 1977.

Petitioners cite Justice Ginsburg's concurring opinion in *Reichle v. Howards*, 566 U.S. ___, 132 S. Ct. 2088, 2097 (2012), for the proposition that Secret Service agents "rightly take into account words spoken to, or in close proximity of, the person whose safety is their charge" in evaluating security threats. Respondents take no issue with that general proposition; as Justice Ginsburg explained, the content of statements made by a person in physical proximity to the Vice President may well be relevant "in determining whether he posed an immediate threat to the Vice President's physical security." *Ibid.* *Reichle*, however, is a very different case than this one. There, the plaintiff was arrested after making physical contact with Vice President Cheney, falsely denying that he

had done so, and responding in a hostile manner to a Secret Service agent's question. *See id.* at 2091-92. Here, respondents were never anywhere near President Bush. Even before they were moved, there were whole buildings between them and the President, and they never engaged in any conduct that might be regarded as threatening. Nothing in *Reichle* suggests that, in the absence of a true or even potential threat, the plaintiff in that case could lawfully have been arrested on the basis of his words alone.

To the contrary, federal courts have recognized for decades that, as a matter of well-established law, it is clear that government agents may not override the First Amendment merely to shield the President or Vice-President from peaceful dissent at public events. Courts have been vigilant in condemning such conduct as unconstitutional.

For example, in 1971, President Nixon attended a public function in North Carolina. Certain federal and local officials excluded anti-war demonstrators from the event because of their critical signs and leaflets. When the protestors filed suit, the district court had no difficulty finding in their favor, calling the defendants' viewpoint-based exclusion a "wholesale assault" on the "right to freedom of assembly and right to petition for redress of grievances." *Sparrow v. Goodman*, 361 F. Supp. 566, 585 (W.D.N.C. 1973), *aff'd sub nom. Rowley v. McMillan*, 502 F.2d 1326 (4th Cir. 1974).

Likewise, in 1972, government officials in Hawaii detained and excluded from a public welcoming ceremony for President Nixon several individuals with signs expressing their opposition to his policies. The court held that the breach of First Amendment rights was so clear as to defeat a motion to dismiss based on immunity. *Butler v. United States*, 365 F. Supp. 1035 (D. Haw. 1973).

When then-Vice President George H. W. Bush attended a public ceremony at Independence Hall celebrating the 200th anniversary of the Constitution, people carrying "non-controversial" signs and banners were welcomed, but anyone with a controversial message was excluded. The district court determined that the federal defendants had violated the Constitution because "[National] Park Service personnel sought to prevent respondents from expressing their dissenting views in any manner that might come to the attention of persons attending the Vice-President's speech, and which might detract from the main-stream patriotism" of the event. *Pledge of Resistance v. We The People 200, Inc.*, 665 F. Supp. 414, 417, 419 (E.D. Pa. 1987).

More recently, in *Mahoney v. Babbitt*, 105 F.3d 1452 (D.C. Cir. 1997), the D.C. Circuit issued an emergency injunction pending appeal prohibiting the National Park Service from barring demonstrators critical of President Clinton's position on abortion rights from his Inaugural Parade route. The court noted that "[n]o case called to our attention says that anyone has ever successfully established the power of

a government to so suppress opposing viewpoints; indeed, in few cases has the government of the United States even tried." *Id.* at 1456-57. The court concluded: "In short, all constitutional authority supports the position we would have thought unremarkable, that a government entity may not exclude from a public forum persons who wish to engage in First Amendment protected activity solely because the government actor fears, dislikes, or disagrees with the opinions of those citizens." *Id.* at 1459 (Sentelle, J.).

In short, the district court and court of appeals' decisions here are just the most recent example in a long line of cases that condemn federal officials' disregard of the First Amendment to shield the President or Vice-President from dissent at public events. There is no Secret Service exemption from the First Amendment.

C. Petitioners' proposed "level of analysis" of the qualified immunity issue is unreasonably fact-specific and improperly incorporates facts contrary to the factual allegations of the Second Amended Complaint.

Petitioners complain that the court of appeals analyzed the issue of qualified immunity at too high a level of generality. But petitioners' proposed level of analysis is so fact-specific that it states no principle at all, and, more egregiously, ignores the factual allegations of the Second Amended Complaint.

Petitioners propose that the proper level of analysis would be captured by asking whether it was clearly established that "'moving one group to a location one block further from the President than another when creating a Presidential security perimeter constituted a violation of that group's First Amendment rights.'" Brief for Petitioners at 22 (quoting the dissenting opinion of O'Scannlain, J.). That statement of the issue suffers from two major defects. First, it assumes that the facts are as petitioners would have them, quite contrary to the facts alleged in the Second Amended Complaint. Second, it is such a remarkably narrow statement of the issue that only a case involving virtually identical facts could ever come within the rule announced by a decision in this case.

As the court of appeals noted, petitioners "inaccurately characterize[d] both the protestors' allegations and the governing law." Pet. App. 44a. The court of appeals explained that petitioners had, among other things, improperly restated respondents' factual allegations about the distances between the two groups of protestors; ignored "the allegation that the pro-Bush demonstrators were permitted to remain along the President's motorcade route, while the anti-Bush protestors were kept away"; and, fundamentally, ignored the crucial fact that "the protestors' claim is not simply that they were moved, but that they were relocated *because* they criticized the President." *Id.* at 44a-45a (emphasis in original). Petitioners repeat those same mistakes here.

Additionally, petitioners' proposed statement of the qualified immunity issue improperly incorporates the false assumption that when petitioners moved respondents they were "creating a Presidential security perimeter." To the contrary, the Second Amended Complaint alleges that petitioners' action against respondents had nothing to do with creating a security perimeter, which had been created almost 30 minutes earlier, *see id.* at 175a-177a, and everything to do with viewpoint censorship. *Id.* at 186a. In sum, petitioners' proposed "level of analysis" is a stacked deck against which plaintiff cannot win.

D. A case with identical facts is not required to survive a qualified immunity defense where, as here, the application of a well-established legal principle to the facts alleged in the Second Amended Complaint is unmistakably clear.

Petitioners' contention that no court had previously held that "Secret Service agents [must] ensure that groups of differing viewpoints [are] positioned in locations exactly equidistant from the President at all times," Brief for Petitioners at 22 (quoting the dissenting opinion of O'Scannlain, J.), misses the point. First, it does not accurately describe petitioners' constitutional grievance.[7] See page 38 above. Second,

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[7] In their petition, petitioners also suggested incorrectly that respondents are seeking a rule that the First Amendment entitled them to be returned to their original location after the

(Continued on following page)

as this Court noted in *Hope v. Pelzer*, 536 U.S. 730, 741 (2002), "the salient question" on a motion for qualified immunity is not whether there is another case with "fundamentally similar" facts, but "whether the state of the law" gave defendants "fair warning" that their actions were unconstitutional.

The issue in this case is whether Secret Service agents can suppress the message of a particular peaceful group of demonstrators specifically *because* of their viewpoint, and *without* a valid security reason, as the Second Amended Complaint alleges that the agents did here. As noted above, there is no dispute about the well-established legal principle that governmental actors violate the First Amendment when they discriminate against individuals exercising First Amendment rights in a public forum because of their disfavored political views. The court of appeals and the district court correctly held that the application of that well-established principle to the facts alleged in the Second Amended Complaint was clear, and the absence of another case with identical or nearly-identical facts therefore does not entitle petitioners to qualified immunity:

President's dinner and before his motorcade departed. Pet. at 18. Respondents' position is that it was constitutionally improper to move them in the first place on the basis of their political viewpoint. Had they not been improperly moved, the question of returning them to their original location along the motorcade route would never arise.

> [T]he denial of qualified immunity does "not require a case directly on point." *Ashcroft v. al-Kidd,* [563] U.S. ___, 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011). Rather, it requires that "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.* It is "beyond debate" that, particularly in a public forum, government officials may not disadvantage speakers based on their viewpoint.

Pet. App. 45a.

When this Court in *Rosenberger, supra*, 515 U.S. at 828, said it was "axiomatic" that the government could not regulate speech based upon the message it conveys, its choice of the word "axiomatic" disposed of arguments such as the one made by petitioners here. The word "axiomatic" in this context means a self-evident or universally recognized truth. American Heritage Dictionary of the English Language (2d College Ed. 1985). That is to say, the proposition should be and is obvious to everyone. Even in a nonpublic forum, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788 (1985). And that is exactly what the well-pleaded facts of the Second Amended Complaint plausibly allege the petitioners did here. No reasonably competent agent could have believed that it was lawful to push the peaceful anti-Bush demonstrators out of sight and sound of President Bush *because* of the viewpoint

they were expressing, *without* any legitimate security purpose, while leaving the pro-Bush demonstrators in place.

E. The court of appeals did not improperly second-guess any split-second security determination by the Secret Service agents.

This case does not involve the courts or respondents second-guessing any urgent security determination by petitioners. The factual allegations in this case cannot support the theory that petitioners made mistaken split-second judgments in a good-faith attempt to carry out their duties. Rather, as alleged in the Second Amended Complaint, it was only after the President was seated in the dining area and the anti-Bush protestors' chants could be heard, that petitioners ordered local police to move respondents two blocks away, where their protest message could not heard by the President during dinner and where their protest signs would not be seen by the President when he departed the restaurant after dinner. Pet. App. 177a-178a. Respondents specifically allege that petitioners made a considered, deliberate choice, based on policy and practice, to treat groups of demonstrators differently based on the content of their messages. Nothing in the Second Amended Complaint reflects the sort of split-second judgments that are entitled to deference from this Court.

As the court of appeals properly concluded:

> In sum, the anti-Bush protestors have pleaded nonconclusory factual allegations that they were treated differently than the pro-Bush demonstrators; that any security-based explanation for this differential treatment offered by the Secret Service agents was pretextual; and that the agents' directives in this case accord with a pattern of Secret Service action suppressing the speech of those opposed to the President. These allegations, taken together, are sufficient to allow the protestors' claim of viewpoint discrimination to proceed.

Id. at 43a.

By suggesting that this case is about second-guessing the agents' security determinations, petitioners are again attempting to substitute their version of the facts for the facts alleged in the Second Amended Complaint. Because this case involves an appeal from the denial of a motion to dismiss, all facts and reasonable inferences must be viewed in the light most favorable to respondents. It is inappropriate for petitioners to attempt to rewrite or recharacterize respondents' factual allegations, or to argue that the evidence will support a different version of events at trial.

This Court, like the district court and the court of appeals below, is faced with the purely legal question whether respondents' allegations state a claim sufficient to survive a defense of qualified immunity. At this stage, "[a]n appellate court reviewing the denial

of a defendant's claim of immunity need not consider the correctness of the plaintiff's version of the facts." *Johnson v. Jones*, *supra*, 515 U.S. at 313 (1995) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985)). In affirming the denial of petitioners' motion to dismiss, the court of appeals applied the proper standards to the allegations in the Second Amended Complaint and reached the proper result.

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be affirmed and the case returned to the district court for further proceedings.

Respectfully submitted,

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REPLY BRIEF

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BRIEFS

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No. 13-115

In the Supreme Court of the United States

TIM WOOD AND ROB SAVAGE, PETITIONERS

v.

MICHAEL MOSS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Respondents provide no sound basis for subjecting petitioners, two Secret Service agents on the President's protective detail, to the burdens of litigation and to potential personal liability for damages (including punitive damages) under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in the circumstances of this case. Disavowing at least one of the two bases for the Ninth Circuit's decision, respondents now acknowledge that, in order to state a claim for a violation of clearly established law, they must sufficiently allege that petitioners moved them "specifically *because* of their viewpoint, and *without* a valid security reason." Resp. Br. 40; see *id.* at 12, 41-42. Respondents cannot meet that burden.

Under the facts alleged in the complaint, petitioners issued a facially viewpoint-neutral order to clear

"all persons" from a street adjacent to an alley leading to the open-air patio where the President was dining. Pet. App. 177a. Respondents do not meaningfully dispute that, while on that street, members of their group (and anyone who had mixed in with their group) were within explosive range of the President. See Pet. Br. 44; Resp. Br. 24. Respondents cannot dispute that simply moving them to the next block (Fourth Street), as petitioners originally directed, would have left their group *closer* to the President than the pro-Bush demonstrators to the west of the Inn. Pet. Br. 4-5 & Diagram A. And respondents no longer dispute that, once they were shifted to the next block, petitioners were entitled to move them a block farther (to Fifth Street) in order to avoid giving them a direct line of sight to the wooden fence behind which the President was dining. See Pet. Br. 7; *id.* at 7 (Diagram B); Resp. Br. 22.

Nothing in the complaint plausibly alleges that petitioners lacked a "valid security reason," Resp. Br. 40, to clear the street. Even the Ninth Circuit, in finding an earlier version of respondents' complaint insufficient, recognized that simply moving respondents to the next block—which is all that respondents now contend to have been unconstitutional—"is not a plausible allegation of disparate treatment" as compared to the treatment of either the pro-Bush demonstrators or the diners and guests at the Inn. 572 F.3d at 971. And respondents' reliance on the alleged actions of *other* Secret Service agents at other times and places to support an inference that these *particular* petitioners had an invidious speech-suppressive motive cannot be squared with this Court's rejection of vicarious

Bivens liability in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009).

In short, even if respondents' allegations are "consistent with" unlawful conduct, *Iqbal*, 556 U.S. at 681, those allegations fail to refute the "obvious alternative explanation," *id.* at 682 (citation omitted), for petitioners' actions here, namely, that they sought to establish an effective security perimeter to protect the President during his unscheduled, last-minute stop for dinner on an outdoor restaurant patio. The Court should reverse and end the prolonged litigation to which petitioners have been subjected.

A. Secret Service Crowd-Control Measures Supported By A Legitimate Presidential-Security Rationale Do Not Violate Clearly Established First Amendment Rights

In order to survive a motion to dismiss, a plaintiff in a *Bivens* suit must "plead factual matter that, if taken as true, states a claim that [the defendant officials] deprived him of his clearly established constitutional rights." *Iqbal*, 556 U.S. at 666. Defining respondents' "clearly established constitutional rights" is thus critical to determining the sufficiency of their complaint. See *id.* at 675 ("[W]e begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity."). Although respondents' brief at points takes an overly broad view of clearly established law, respondents ultimately recognize that, in order to overcome petitioners' qualified-immunity defense, their complaint must sufficiently allege that petitioners moved them "specifically *because* of their viewpoint, and *without* a valid security reason." Resp. Br. 40; see *ibid.* (describing

that as "[t]he issue in this case"); see also *id.* at 12 (same); *id.* at 41-42 (similar). So long as petitioners *did* have "a valid security reason" for moving respondents, they did not violate any clearly established First Amendment right.

1. This Court has "emphasized" that the qualified-immunity inquiry requires a "'particularized'" analysis of whether the "'contours of the right'" asserted by the plaintiff were "'sufficiently clear that a reasonable official would understand that what he [was] doing violate[d] that right.'" *Saucier* v. *Katz*, 533 U.S. 194, 202 (2001) (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987)). Accordingly, as the opening brief details (at 22-25), the Court has consistently framed the right at issue for purposes of qualified immunity not "as a broad general proposition," but instead in relation to the "specific context of the case." *Brosseau* v. *Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (quoting *Saucier*, 533 U.S. at 201).

The court of appeals here deviated significantly from that approach. In its view, Secret Service agents violate clearly established First Amendment rights simply by "explicitly treat[ing] pro- and anti-Bush demonstrators differently," regardless of the agents' reasons for doing so. Pet. App. 35a. The court accordingly held—separate and apart from any allegations that petitioners acted with a viewpoint-discriminatory motive, *id.* at 38a-43a—that a contention that respondents "were moved to a location where they had less opportunity than the pro-Bush demonstrators to communicate their message to the President and those around him" would in itself "support a plausible claim of viewpoint discrimination." *Id.* at 38a. The court then proceeded to deny petitioners

qualified immunity on the ground that "[i]t is 'beyond debate' that, particularly in a public forum, government officials may not disadvantage speakers based on their viewpoint." *Id.* at 45a; see *id.* at 49a.

As the opening brief explains (at 25-37), the court of appeals erred in concluding that the existence of a general right to be free from "viewpoint discrimination in a public forum," Pet. App. 49a, clearly established the more specific right of respondents in this case to stand within a particular distance of the President. Respondents do not meaningfully argue otherwise. They instead steer clear of the court of appeals' theory by emphasizing that their own theory of the case is that petitioners moved them "for purely political reasons." Resp. Br. 15. There is accordingly no dispute that the court of appeals erred when it suggested that petitioners could be subject to liability merely based on allegations that groups with differing viewpoints were placed at different distances from the President.

2. Although respondents do not repeat that particular error, portions of their brief nevertheless contain the same "familiar qualified immunity errors," Pet. App. 22a (O'Scannlain, J., dissenting from the denial of rehearing en banc), that infected the Ninth Circuit's analysis. Like the court of appeals, respondents appear to believe (Br. 32-37) that decisions of this Court describing general viewpoint-neutrality principles in other contexts necessarily compel a particular legal rule in the distinct context of crowd control during a last-minute, unscheduled stop by the President.[1]

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[1] Amicus NAACP Legal Defense and Educational Fund's discussion of viewpoint-discrimination law (Br. 25-34) overlooks the qualified-immunity context of this case entirely.

Respondents' one-size-fits-all approach to viewpoint discrimination cannot be reconciled with this Court's decision in *Reichle* v. *Howards*, 132 S. Ct. 2088 (2012). The plaintiff in that case claimed that two Secret Service agents had engaged in a form of viewpoint discrimination by arresting him "in retaliation for criticizing the Vice President." *Id.* at 2092. The Court concluded that, even assuming the agents had in fact arrested the plaintiff in retaliation for his viewpoint, the agents were entitled to qualified immunity. *Id.* at 2093-2097. Emphasizing the need to define the constitutional right at issue in a "particularized" and "specific" way, the Court reasoned that it "has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause; nor was such a right otherwise clearly established at the time of [the plaintiff's] arrest." *Id.* at 2093-2094 (internal quotation marks and citation omitted). Respondents correctly point out (Br. 34-35) that the plaintiff in *Reichle* touched the Vice President, while respondents here did not touch the President. But the relevant point for purposes of qualified immunity is the level of specificity at which the Court defined the viewpoint-discrimination right at issue. Just as "the general right to be free from retaliation for one's speech" was not specific enough in *Reichle*, 132 S. Ct. at 2094, so too the general "principle of viewpoint neutrality" (Resp. Br. 33) is not specific enough here. See *Ashcroft* v. *al-Kidd*, 131 S. Ct. 2074, 2084 (2011) ("The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.").

This Court has previously considered as part of the "circumstances" relevant to whether a constitutional right was clearly established "the duty to protect the safety and security of the Vice President of the United States from persons unknown in number." *Saucier*, 533 U.S. at 209. No sound reason exists for disregarding that same duty (as applied to the President rather than the Vice President) here. An agent in petitioners' position could reasonably have believed that it was lawful to move respondents to the next block, so long as he had a legitimate security rationale for doing so. That is true even if respondents' viewpoint also factored into the decisionmaking process. As the opening brief explains (at 32-36), consideration of viewpoint is not invariably unlawful. A police officer who "bear[s] animus toward the content of a suspect's speech," for example, is nevertheless entitled to "arrest [a] suspect because his speech * * * suggests a potential threat." *Reichle*, 132 S. Ct. at 2095. Particularly given that backdrop, a Secret Service agent could reasonably conclude that he may take speech into account in assessing how close someone should be to the President; that any animus he might have toward the speech would not necessarily preclude him from taking legitimate security precautions; and that even if his motives are mixed, the First Amendment does not categorically foreclose him from acting to advance the Nation's "overwhelming" interest "in protecting the safety of its Chief Executive," *Watts* v. *United States*, 394 U.S. 705, 707 (1969) (per curiam). See *Reichle*, 132 S. Ct. at 2097 (Ginsburg, J., concurring in the judgment) (recognizing that Secret Service agents are "duty bound to take the content of" speech

"into account in determining" whether someone poses "an immediate threat" to a protectee's security).

Respondents attack a straw man when they suggest (Br. 33) that petitioners seek a "Secret Service exception to the First Amendment." The point is not that the First Amendment is wholly inapplicable to the Secret Service, but that application of the First Amendment is context-specific, see, *e.g.*, *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1220 (2011), and the qualified-immunity inquiry even more so, see, *e.g.*, *Brosseau*, 543 U.S. at 198. Respondents cannot identify any case (let alone any precedent of the Ninth Circuit or this Court) that would have given petitioners sufficient notice that their actions in this case, if undertaken at least in part to further a legitimate security interest, would amount to unconstitutional viewpoint discrimination. See Pet. Br. 25-28 (discussing cases cited at Resp. Br. 33-37); see also *Sherrill* v. *Knight*, 569 F.2d 124, 126 (D.C. Cir. 1977) (challenge not to crowd control, but to procedures and standards for issuing White House press passes) (cited at Resp. Br. 34). Petitioners accordingly should not face potential personal liability, and the burdens of litigation, unless respondents can sufficiently plead that petitioners were acting solely with a viewpoint-discriminatory motive and lacked any legitimate security justification for their actions.[2] See *Hunter* v. *Bryant*, 502 U.S. 224, 229 (1991) (per curiam) (recognizing that the protections of qualified immunity are "nowhere more important than when the specter of Presidential assassination is raised").

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[2] That is true whether the claim is denominated as a claim of viewpoint discrimination, "content discrimination," or "discrimination against expression." See Resp. Br. 30 n.6.

B. Respondents' Complaint Does Not Plausibly Allege That Petitioners Lacked A Valid Security Rationale For Moving Respondents

To prevail, respondents must allege that petitioners moved respondents "specifically *because* of their viewpoint, and *without* a valid security reason." Resp. Br. 40. As this Court's recent decisions interpreting Federal Rule of Civil Procedure 8(a)(2) make clear, respondents have failed to do so.

In *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), this Court concluded that a complaint whose allegations were "consistent with an unlawful agreement * * * nevertheless * * * did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful * * * behavior." *Iqbal*, 556 U.S. at 680 (describing *Twombly*). In *Iqbal*, the Court found claims of racial and religious discrimination by high-ranking government officials to be implausible, even "[t]ak[ing] as true" allegations that one official "direct[ed]" the "arrest[] and det[ention of] thousands of Arab Muslim men . . . as part of [the] investigation of the events of September 11" and that both officials "approved" a "policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI." *Id.* at 681 (citation omitted); see *id.* at 669. The Court explained that "[a]s between" the "purposeful, invidious discrimination [the plaintiff] asks us to infer" and the "'obvious alternative explanation'" of a "nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts," the

former was "not a plausible conclusion." *Id.* at 682 (quoting *Twombly*, 550 U.S. at 567).

As the opening brief explains (at 38-52), the approach set forth in *Iqbal* and *Twombly* requires dismissal of respondents' complaint. Like the complaint in *Iqbal*, the complaint here provides allegations merely "consistent with" a theory that government officials acted with a discriminatory purpose. 556 U.S. at 681. "But given more likely explanations, they do not plausibly establish this purpose." *Ibid.* In particular, petitioners' proffered security rationale for moving respondents (to get them out of weapons range of the President) is an "obvious alternative explanation" for petitioners' actions. *Id.* at 682 (citation omitted). In light of that "obvious alternative explanation," respondents' allegations, whether taken individually or taken together, do not support a "plausible conclusion," *ibid.*, that petitioners were entirely "*without* a valid security reason" to act as they did, Resp Br. 40.[3]

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[3] *Iqbal* rejected a contention, essentially identical to an argument respondents make here (Br. 26), that the pleading standard it applied was inconsistent with Federal Rule of Civil Procedure 9(b). 556 U.S. at 686-687. This case does not require the Court to address precisely how much "more likely," *id.* at 680, 681, an alternative explanation must be to render a plaintiff's theory implausible. Although some amici attempt to minimize *Iqbal*'s reference to "more likely" alternative explanations, they acknowledge that a complaint should be dismissed when there is an "obvious" alternative to the theory of liability advanced by the plaintiff. See Pub. Justice Amicus Br. 17; NAACP Amicus Br. 11. Here, it is obvious from the face of the complaint that petitioners had a legitimate security rationale for moving respondents, and the complaint thus fails to plead facts sufficient to divest petitioners of their qualified immunity. The heightened showing that qualified immunity requires in this context, in combination with the obvious existence of a security rationale on the facts as alleged, differentiates this case

Comparison to the pro-Bush demonstrators. For the reasons explained in the opening brief (at 30-31, 44-45), respondents' contention that they were "treated differently than the similarly situated pro-Bush demonstrators," Resp. Br. 20 (emphasis omitted), is misconceived. As the President's motorcade proceeded to the Inn, the two groups had equal access to the President from opposite sides of Third Street, and they were able to demonstrate as they saw fit. Pet. App. 175a. Once the motorcade passed and the President entered the outdoor patio for dinner, however, the two groups were not "similarly situated." Respondents were on the street directly in front of both the Inn and an alley leading to the patio where the President was dining. *Id.* at 212a. The pro-Bush demonstrators were on the next block over, shielded from the President's location by a large building (the U.S. Hotel). *Ibid.* Petitioners thus had legitimate reasons to be substantially more concerned about the potential threat posed by respondents' group.

Respondents continue to assert (Br. 23) that they were not "in handgun or explosive range of the President" when they were on the street in front of the Inn. But as the opening brief observed (at 44-45), that conclusory assertion is belied by the diagram in respondents' own complaint, which shows that members of respondents' group (and anyone who might have infiltrated that group) were close enough to throw an explosive that could have harmed the President. Respondents' brief does not meaningfully deny or refute that observation, but instead simply asserts that any focus on respondents' weapons-range proximity to the

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from the mine run of civil-rights cases with which the amici are concerned. See NAACP Amicus Br. 12-21.

President "misses the point." Resp. Br. 24. Respondents' weapons-range proximity to the President, however, corroborates petitioners' stated reason for moving them, namely, that petitioners "did not want anyone within handgun or explosive range of the President," Pet. App. 177a.[4]

Respondents emphasize that they were "moved to a location more than twice as far from the Inn" as the location of the pro-Bush demonstrators. Resp. Br. 20; see, *e.g.*, *id.* at 22. But as respondents themselves recognize (*id.* at 22), their ultimate location is not the proper focus of the inquiry. The complaint alleges that respondents' group was initially moved only to the next block (Fourth Street). Pet. App. 177a. According to the map attached to the complaint (*id.* at 212a, Pet. Br. 4 (Diagram A)), that location was still nearer to the President than the position of the pro-Bush demonstrators. As the opening brief explains (at 5-7 & Diagram B, 44-45), respondents' new location itself provided a line of sight to the patio fence. Respondents were "subsequently" moved a block farther back (to Fifth Street). Pet. App. 177a. Respondents do not contest the necessity of that second move. See Resp. Br. 22. They instead characterize the issue as a

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[4] Respondents suggest in passing (Br. 21-22) that if removing everyone from weapons-range proximity were petitioners' actual rationale, petitioners could simply have cleared "the sidewalk outside the mouth of th[e] alley." But blocking off part of the sidewalk with no natural boundaries would have required diverting additional resources; taking that approach would have been less secure because members of respondents' group would still have been only "a few steps" from where they could potentially cause serious harm, *id.* at 21; and such after-the-fact micromanagement of Secret Service agents' on-the-spot security precautions should not provide a basis for subjecting those agents to *Bivens* liability.

"red herring" and emphasize that their theory of the case is that petitioners acted unconstitutionally when petitioners *initially* moved them over to the next block. Respondents thus appear to recognize that, if petitioners were entitled to clear the street adjacent to the Inn and the alley, they were not required to position respondents an equivalent distance from the Inn as the pro-Bush demonstrators.

The initial move—which left respondents *closer* to the President than were the pro-Bush demonstrators—does not plausibly establish that petitioners lacked a valid security rationale and acted solely with the intent to mute respondents' speech. As the court of appeals recognized in rejecting respondents' earlier complaint, alleging that petitioners moved respondents "to a location situated a comparable distance from the Inn as the other demonstrators, thereby establishing a consistent perimeter around the President" is "not a plausible allegation of disparate treatment." 572 F.3d at 971. The court explained that "[i]f [petitioners'] motive in moving [respondents] away from the Inn was—contrary to the explanation they provided to state and local police—suppression of [respondents'] anti-Bush message, then presumably, they would have ensured that demonstrators were moved to an area where the President could not hear their demonstration, or at least to an area farther from the Inn th[a]n the position that the pro-Bush demonstrators occupied." *Ibid.* Respondents have never alleged that the President, who was dining on an outdoor patio, could not hear their demonstration from the next block (or even that he could not hear it from their final location on Fifth Street), see Pet. Br. 31 n.4, and an inference that the President could not hear a group of

200 to 300 people only half a block away would be unreasonable.

Respondents briefly hypothesize (Br. 24-25) that petitioners should have been *more* concerned about the pro-Bush demonstrators than about their group, on the theory that "someone intent on doing harm would * * * more likely conceal himself or herself among a group of the President's supporters." Although an assailant might conceivably adopt that strategy, the Secret Service protects the President not only from sophisticated assassins (who could be anywhere) but also from people who might lash out at him, particularly if urged to do so by a group of like-minded people. See Pet. Br. 34 & n.5 (discussing attacks by protesters). Petitioners thus had an entirely valid security reason for clearing the street adjacent to the alley and the Inn in order to ensure that *both* groups of demonstrators were out of weapons range.

The timing of petitioners' order. The allegation that the President sat down to dinner 15 minutes before petitioners directed the police to clear the street, Pet. App. 177a, does not support an inference that petitioners lacked a valid security rationale for that directive. The substantially more likely explanation for the timing of petitioners' order is that petitioners—who had limited time to secure the area—did not initially have the opportunity to fully assess the security risk of having respondents' group on the street adjacent to the alley. Respondents acknowledge (Br. 30) that petitioners had only a limited amount of time (roughly 20 minutes) within which to make security arrangements after the President changed his plans and decided to dine outdoors at the Inn. Petitioners could not realistically develop a perfect security plan

in that short a period. Rather, they would naturally seek to improve the plan as the situation developed or as further optimizations became apparent. Indeed, respondents do not even allege that petitioners knew the President would dine on the patio (as opposed to inside the Inn, where he would have been more shielded from respondents' group) until the President actually arrived and sat down. Pet. App. 175a.[5] In any event, regardless of the timing, moving a group that was within weapons range of the President to a distance that was still *closer* to the President than another group of demonstrators cannot plausibly suggest a purely discriminatory motive.

Treatment of the diners and guests at the Inn. Even the Ninth Circuit recognized, in rejecting respondents' earlier complaint, that the "allegation that the diners and guests inside the Inn were allowed to remain in close proximity to the President without security screening does not push their viewpoint discrimination claim into the realm of the plausible." 572 F.3d at 971. The court declined to reconsider the issue in the second appeal and noted law-of-the-case concerns about whether the mandate from the first appeal would permit such reconsideration. See Pet. Br. 47 & n.6; Pet. App. 43a n.5. Respondents do not address those law-of-the-case concerns. But even assuming the issue is fairly presented, for the reasons explained in the opening brief (at 47-48), the diners

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[5] Respondents' attempt to paint the picture that petitioners moved them only when their chants became audible is additionally undermined by their failure specifically to allege that they only started chanting 15 minutes or so after the President arrived. It is implausible that respondents, who had gathered specifically to protest the President, stood quietly by for that length of time.

and guests at the Inn were not similarly situated to respondents, and any differential treatment of them does not create an inference of discriminatory motive.

Respondents' contention (Br. 28) that the diners and guests at the Inn "posed a greater risk of assaulting the President" erroneously assumes that *anyone* closer to the President is a greater threat than someone farther away. That is not so. Because the President's visit to the Inn was unknown even to the Secret Service until just before it occurred, the diners and guests at the Inn could not have had any expectation that they would see the President that evening or any opportunity to premeditate a plan to cause him harm. The diners and guests thus presented a risk to the extent that one of them might have been carrying a weapon for unrelated reasons and decided on the spur of the moment to try to use it on the President, or decided spontaneously to use a utensil or other nearby object as a weapon.[6] See *id.* at 29. The Secret Service could mitigate that risk by keeping close watch on the relatively small number of people in the Inn (see Pet. App. 177a) and controlling ingress and egress so as to keep the situation stable.

Under the circumstances, respondents' group presented a different, and potentially greater, risk. The group was larger in number (see Pet. App. 169a) and was crowded together in a manner that could have

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[6] Such an ad hoc attack would have been so unlikely actually to harm the President that it is doubtful anyone would have tried it. See *Rubin* v. *United States*, 525 U.S. 990, 993 (1998) (Breyer, J., dissenting) (observing that "the Secret Service seeks to surround a President with an all-encompassing zone of protection, such that agents, once alerted, can form a human shield within seconds") (internal quotation marks and citation omitted).

made it difficult to spot individual threatening movements, such as someone drawing a gun (see Pet. Br. 4 (Diagram A)). The original members of the group had self-identified as critical of the President, had ventured out that evening (and had chosen their route) precisely because the President would be nearby, and had ample opportunity to arm themselves with their proximity to the President in mind. And the Secret Service could not necessarily prevent additional people, who had heard about the President's location and arrived with the specific purpose of attempting to harm him, from joining the crowd.

Respondents' reliance on the allegations about the diners and guests at the Inn is also flawed on a more fundamental level. At bottom, the inference respondents would draw from those allegations is that petitioners simply did not care about risks to the President's physical safety, and thus must have moved respondents for reasons unrelated to any such risks. See Resp. Br. 29. That inference requires a conclusion that petitioners deliberately failed to carry out the Secret Service's most critical mission, see 18 U.S.C. 3056(a)(1), or, at the very least, were massively incompetent. Cf. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (recognizing a "presumption of regularity" for certain government actions) (citation omitted). Particularly as compared to the "obvious alternative explanation," *Iqbal*, 556 U.S. at 682 (citation omitted), that petitioners legitimately viewed respondents' group as more of a threat, the inference is not plausible.

The Secret Service's alleged unwritten policy of viewpoint discrimination. The complaint expressly recognizes that the Secret Service has "written guide-

lines, directives, instructions and rules which purport to prohibit Secret Service agents from discriminating between anti-government and pro-government demonstrators, between demonstrators and others engaged in expressive assembly, and between demonstrators and members of the public not engaged in expressive assembly." Pet. App. 184a. Respondents, however, would treat those written policies as fraudulent; infer that the Secret Service's *actual* policy was to actively suppress disfavored speech; and would then further infer that petitioners were engaging in viewpoint discrimination in the particular circumstances of this case. Nothing in the complaint makes that chain of reasoning plausible.

For the reasons explained in the opening brief (at 48-49), the Presidential Advance Manual, which was not prepared by or for the Secret Service, does not suggest that petitioners here engaged in viewpoint discrimination. Respondents rely (Br. 5) on a passage advising members of the President's advance team, at certain ticketed presidential events, to "work with the Secret Service and have them ask the local police department to designate a protest area where demonstrators can be placed; preferably not in view of the event site or motorcade route." Pet. App. 219a; see *id.* at 215a (section on "Crowd Raising and Ticket Distribution"). That statement is most naturally understood to reflect that the Secret Service is the primary liaison to local police during presidential visits. Particularly when viewed in light of the surrounding context, it cannot plausibly be taken to suggest that the Secret Service disregards its written policies and engages in systematic viewpoint discrimination. Among other things, the manual elsewhere expressly instructs that

demonstrators who "appear likely to cause only a political disruption" are "the Advance person's responsibility" and that the Secret Service should be notified only if "the demonstrators appear to be a security threat." *Id.* at 220a. That express recognition that the Secret Service deals only with security threats reinforces both the Secret Service's own written policies and the obvious security-based explanation for petitioners' actions here.

The opening brief also explains (at 49) why the complaint's largely conclusory allegations of viewpoint discrimination by *other* Secret Service agents in *other* situations at *other* times—even if true, and even if found to be instances of unlawful discrimination—do not support an inference of viewpoint discrimination by petitioners in this particular case. Respondents' brief acknowledges (Br. 25-26) differences between those alleged incidents and this one, but contends that the other incidents would provide evidence of a "Secret Service policy" of viewpoint discrimination, which would in turn suggest that petitioners were "acting in accordance" with that policy in the circumstances of this case. That argument is foreclosed by *Iqbal*, which rejected an analogous theory of inferential animus.

The Court in *Iqbal* recognized that, in a *Bivens* suit alleging unconstitutional discrimination, individual government officials "cannot be held liable" in their personal capacities "unless *they themselves* acted on account of a constitutionally protected characteristic." 556 U.S. at 683 (emphasis added); see *id.* at 677. The Court accordingly found claims of discriminatory motive by high-ranking government officials implausible notwithstanding that the plaintiff "allege[d] that various *other* defendants," who were the officials' subordi-

nates, might have acted "for impermissible reasons." *Id.* at 682-683. The Court acknowledged that certain allegations in the complaint, "if true, and if condoned [by the officials], could be the basis for some inference of wrongful intent on [the officials'] part." *Id.* at 683. But the complaint nevertheless "d[id] not suffice to state a claim," because it failed to "plausibly suggest [the officials' own] discriminatory state of mind." *Ibid.*

Respondents' theory in this case would go even further than the theory rejected in *Iqbal*. It would resuscitate the theory rejected in *Iqbal* by relying on the actions of certain field-level operatives (a handful of Secret Service agents) to create an inference of discrimination at the highest levels of the agency (an unwritten agency-wide policy favoring viewpoint discrimination). It would then take the additional step of inferring that different field-level operatives (petitioners) acted in accordance with that policy and themselves harbored unconstitutional motives. The Court should not effectively authorize vicarious *Bivens* liability by allowing plaintiffs to impugn the motives of every single officer in an agency based on the alleged wrongful intent of a few. And it especially should not do so in the critical and sensitive context of Secret Service agents protecting the physical safety of the President.

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For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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TIM WOOD AND ROB SAVAGE,
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v.

MICHAEL MOSS, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

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Matrixx Initiative, Inc. v. Siracusano, __ U.S. __, 131 S. Ct. 1309 (2011) ..... *passim*

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Riordan v. Kempiners, 831 F.2d 690 (7th Cir. 1987) 13

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Swann v. Charlotte-Mecklenburg Board of Education, 66 F.R.D. 483 (W.D.N.C. 1975) .. 16-17

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Village of Arlington Heights v. Metropolitan

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Williams v. Wallace, 240 F. Supp. 100 (M.D. Ala. 1965) 1

Willis v. Pickrick Restaurant, 234 F. Supp. 179 (N.D. Georgia 1964) 1

Court Filings and Docketed Cases

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Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the House Committee on the Judiciary, 111th Cong. 79-92 (2009) 2, 4

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Federal Rules and Regulations

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Other Authorities

Debo P. Adegbile & Joshua Civin, *Restoring Access to Justice: The Impact of* Iqbal *and* Twombly *on Federal Civil Rights Litigation*, 5 Advance 19 (2011) 2

Amy Armstrong et al., *The High Cost of Segregation: Exploring the Relationship Between Racial Segregation and Subprime Lending*, Furman Ctr. for Real Estate & Urban Policy (2009) 17

Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 Notre Dame L. Rev. 849 (2010) 15

Dual-Process Theories in Social Psychology (Shelly Chaiken & Yaacov Trope eds., 1999) 19

Jennifer Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-Sentencing Outcomes*, 17 Psychological Sci. 383 (2006) 17-18

Kurt Eichenwald, *Texaco Executives, On Tape, Discussed Impeding a Bias Suit*, N.Y. TIMES, Nov. 4, 1996 14-15

Kurt Eichenwald, *Texaco to Make Record Payout In Bias Lawsuit*, N.Y. TIMES, Nov. 16, 1996 15

Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 Education Researcher 59 (2010) 17

Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1 (2007) 19, 20

Edward A. Hartnett, *Taming* Twombly, 158 U. Pa. L. Rev. 473 (2010)..... 20

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Diane M. Mackie et al., *Social Psychological Foundations of Stereotype Formation, in* Stereotypes and Stereotyping (C. Neil Macrae et al. eds., 1996)..... 21

Lincoln Quillian, *New Approaches to Understanding Racial Prejudice and Discrimination*, 32 Ann. Rev. Sociol. 299 (2006) 21

Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 Ind. L. J. 119 (2011) 15

Amos Tversky & Daniel Kahneman, *Judgments of and by Representativeness*, in Judgment under Uncertainty: Heuristics and Biases 84 (Daniel Kahneman et al. eds., 1982) 20

Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Sci. 1124 (1974) 19-20

Howard A. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 Lewis & Clark L. Rev. 157 (2010)..... 14, 15

INTEREST OF AMICUS[1]

The NAACP Legal Defense & Educational Fund, Inc., (LDF) is a non-profit corporation established under the laws of the state of New York to assist African Americans and other people of color in securing their civil and constitutional rights through the prosecution of lawsuits that challenge racial discrimination. In its mission to achieve a more just society, LDF has long been concerned about safeguarding the rights of free speech and assembly, through its advocacy on behalf of demonstrations led by Martin Luther King, Jr., and other civil rights advocates for voting rights and equal access to lunch counters, buses, restaurants, and other public accommodations. *See, e.g.*, *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); *Abernathy v. Alabama*, 380 U.S. 447 (1965); *Thomas v. Mississippi*, 380 U.S. 524 (1965); *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964); *Williams v. Wallace*, 240 F. Supp. 100 (M.D. Ala. 1965); *Willis v. Pickrick Rest.*, 234 F. Supp. 179 (N.D. Georgia 1964).

In addition, LDF has vigilantly monitored developments in pleading requirements and other rules of civil procedure, including through testimony and in filings with this Court, recognizing that these rules have a significant effect on individuals' ability to ac-

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[1] The parties have consented to the filing of this amicus brief, and their letters of consent are on file with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, counsel for amicus state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

cess courts and vindicate their civil rights. *See, e.g.*, *Swierkiewicz v. Sorema NA*, 534 U.S. 506 (2002); *NAACP v. Button*, 371 U.S. 415 (1963); Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the Senate Committee on the Judiciary, 111th Con. 253-69 (2009) (statement of John Payton, LDF President and Director-Counsel); Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcommittee on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. 79-92 (2009) (statement of Debo P. Adegbile, LDF Director of Litigation); Debo P. Adegbile & Joshua Civin, *Restoring Access to Justice: The Impact of* Iqbal *and* Twombly *on Federal Civil Rights Litigation*, 5 Advance 19 (2011).

INTRODUCTION AND SUMMARY OF ARGUMENT

Secret Service agents are tasked with the solemn and significant responsibility of presidential security, but their powers remain constrained by the Constitution. This case addresses the constitutionality of the decision by Secret Service agents to move a multi-generational group of peaceful protesters, which included senior citizens and infants, out of the hearing and sight of the President, while leaving demonstrators supportive of the President and those expressing no political opinion in closer proximity.

In this case, the Secret Servant agents, defendants below and petitioners here, assert that they were motivated solely by legitimate security concerns in moving the protesters, plaintiffs below and respondents here. The agents suggest that the non-discriminatory inference that they favor is relatively

more plausible than the inference of viewpoint discrimination raised by the facts alleged in the protesters' complaint—most notably, that the protesters were moved, and that demonstrators supporting the President and those expressing no political viewpoint were not.

Based on this comparative assessment of relative plausibility, the agents contend that the protesters' complaint should be dismissed on the pleadings, without any opportunity for discovery to support their claim. Whether or not the protesters' claim ultimately proves meritorious after an adequate opportunity for discovery, dismissing their claims at the pleading stage, as the agents urge, could set a precedent that would further increase the obstacles facing *all* plaintiffs seeking access to the courthouse to vindicate their constitutional rights. The delicate issues of qualified immunity and Presidential security involved in this case should not give the petitioners blanket authority to cite legitimate security concerns and thereby heighten the pleading standard that this Court has established.

In two recent cases, this Court altered the pleading standard in federal lawsuits by imposing a "plausibility" requirement that plaintiffs must meet in order to survive a defendant's motion to dismiss and proceed with their lawsuit. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).[2] If adopted by this

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[2] LDF recognizes that *Iqbal* and *Twombly* represent the current state of the law as to the appropriate pleading standard in federal civil litigation, though it has expressed grave concerns about the potential impact of this standard on the effec-

Court, petitioners' insistence on a comparative analysis of relative plausibility would impose significant additional obstacles, in effect transforming the governing "plausibility" pleading standard into a "probability" pleading standard.

While LDF endorses the arguments raised by respondents with respect to the application of pleading requirements to this case, it writes separately with the aim of cautioning against the likely unintended consequences imposed upon plaintiffs generally, and civil rights claimants particularly, that would arise from altering the framework set forth in *Iqbal* and *Twombly* in the manner petitioners suggest.

Unless the plausibility standard is applied carefully for the purpose of screening out only those claims that truly lack any sufficient facts suggesting a plausible inference of liability—rather than those that merely seem on their face to be comparatively less likely than defendants' suggested inferences—a heightened pleading standard could bar the courthouse doors to many who have been subjected to unlawful discrimination. This is especially true in the context of civil rights claims, where plaintiffs face an

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tive vindication of civil rights. *See, e.g.*, Has the Supreme Court Limited Americans' Access to Courts?: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 253-69 (2009) (statement of John Payton, President and Director-Counsel, NAACP Legal Defense and Educational Fund, Inc.); Access to Justice Denied: Ashcroft v. Iqbal: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. 79-92 (2009) (statement of Debo P. Adegbile, Director of Litigation, NAACP Legal Defense and Educational Fund, Inc.).

information asymmetry when filing suit because many of the underlying facts often remain within a defendant's exclusive control and therefore can likely be obtained only through the appropriate use of the discovery tools that the Federal Rules of Civil Procedure provide. Moreover, there is a particular danger that plausible discrimination claims will be dismissed if they must be weighed at the pleading stage against a defendant's claimed alternative narrative, because many judges (like citizens more generally) intuitively view discrimination as less plausible than a non-discriminatory alternative motive. Although we have made substantial progress as a nation, these intuitions are belied by empirical research and evidence of persistent discrimination in many aspects of our society. Appropriate factual development is therefore essential to ensure that plaintiffs have a fair opportunity to seek redress for civil rights violations.

Also of concern, petitioners mischaracterize the legal standard for intentional discrimination, contending that they acted unlawfully only if viewpoint discrimination was their sole motivation. This Court has long held that an action raises constitutional concerns if plaintiffs can establish that "a discriminatory purpose has been *a motivating factor* in the decision." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (emphasis added).

Moreover, petitioners misapprehend how plausibility pleading should apply in the context of intentional discrimination claims. Petitioners mistake a *justification* for their viewpoint-conscious decision-making with an *alternative explanation* for their

conduct. Their asserted justification for viewpoint-conscious conduct does not render implausible the respondents' asserted inference that petitioners took their viewpoint into account, and therefore does not warrant dismissal on the pleading.

Determining whether the Secret Service agents' actions in the particular context of this case can ultimately be justified, given the security concerns involved, is a far different and more difficult question than whether the protesters have plausibly stated a claim for viewpoint discrimination on the pleadings. Whatever this Court's view on the ultimate merits of the protesters' claims, or of the role of qualified immunity in this dispute, the Secret Service agents' contention that the protesters failed to state a plausible claim of intentional discrimination is fully inconsistent with the pleading standard established by this Court in *Iqbal* and *Twombly*.

ARGUMENT

I. Petitioners' arguments risk heightening pleading requirements far beyond *Iqbal* and *Twombly* by transforming "plausibility" pleading into "probability" pleading.

Petitioners misread the plausibility standard that this Court established in *Twombly* and *Iqbal*. As this Court has recognized, those cases did not embrace a "probability" requirement in general civil pleadings. *See Matrixx Initiative, Inc. v. Siracusano*, __ U.S. __, 131 S. Ct. 1309 (2011); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). Further heightening pleading requirements beyond the plausibility standard set forth in *Iqbal* and *Twombly* would have enormously harmful implica-

tions for civil rights plaintiffs in particular. Under the proper application of those cases, respondents' second amended complaint makes sufficient factual allegations that plausibly suggest they were victims of discriminatory conduct; their complaint, therefore, is not amenable to dismissal on the basis of a comparative assessment of petitioners' alternative explanation, however plausible it may be.

A. If a complaint raises a plausible inference of liability, *Iqbal* and *Twombly* do not authorize dismissal simply because defendants raise an inference they assert to be more plausible.

In *Iqbal*, this Court expanded its holding in *Twombly*, which had stepped away from the traditional, broad understanding of the "fair notice" approach to pleading that the Federal Rules of Civil Procedure had originally promoted when they were enacted in 1938. This Court invigorated that standard in *Conley v. Gibson*, 355 U.S. 41, 48 (1957), and it governed review of complaints filed in federal civil lawsuits for over fifty years thereafter. After giving *Conley*'s broad articulation of pleading sufficiency its "retirement" in *Twombly*, 550 U.S. at 563, and *Iqbal*, the Court replaced it with a new "plausibility standard": a claim brought under Federal Rule of Civil Procedure 8 will survive a motion to dismiss only if it alleges "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 677–78 (citing *Twombly*, 550 U.S. at 570) (internal quotation marks omitted).

This plausibility standard requires a plaintiff's complaint to plead facts that are more than "'merely

consistent with' a defendant's liability" and demands more than the "sheer possibility that a defendant has acted unlawfully." *Id.* at 678 (citing *Twombly*, 550 U.S. at 556); *see also Matrixx Initiatives*, 131 S. Ct. at 1322–25 & n.12. Yet the Court expressly cautioned that plausibility pleading "is not akin to a 'probability requirement.'" *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556–57).

Notwithstanding this Court's rejection of probability pleading in *Iqbal* and *Twombly*, however, petitioners appear to invite the Court to adopt the functional equivalent: they urge dismissal on the pleadings of discriminatory intent claims whenever a court considers defendant's alternative, innocent explanation for the facts alleged to be "*more likely*" than that advanced by the plaintiff. Pet. Br. 18. Applying such a standard at the pleading stage, before the plaintiff has access to discovery, would not only apply a standard more stringent than that permitted at summary judgment, it would be a dramatic departure from *Twombly* and *Iqbal*, as well as this Court's application of those cases in *Matrixx Initiatives*, 131 S. Ct. at 1322–25.

Nothing in *Iqbal* or *Twombly* suggests that mere recitation of a plausible, innocent alternative explanation requires dismissal of a complaint containing factual allegations that, if true, permit a plausible inference of unlawful motive. And nothing suggests that it is proper for courts to weigh the relative plausibility of the plaintiff's suggested inferences against those of the defendant at the pleading stage. *See Twombly*, 550 U.S. at 556 (stating a claim "may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is

very remote and unlikely") (internal citation and quotations omitted).

All that is needed is for the facts asserted by the plaintiff, in their best possible light, to cross the line from "sheer possibility" of liability to a "'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support the claim." *Twombly*, 550 U.S. at 568 & n.8 (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)). Once that line is crossed, and an inference of liability is plausible, the pleading standard is satisfied and cannot be nullified by the relative plausibility of even a compelling alternative inference suggested by defendant.

Indeed, this Court has already so held. In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, a case decided after *Twombly*, this Court held that determining whether a complaint gives rise to a *plausible* inference of liability—the standard at issue under the Federal Rules' general pleading requirements—does *not* require a comparative evaluation of plausible inferences. *Tellabs*, 551 U.S. at 314. In contrast, the Court held that determining the existence of a "strong" inference—the heightened pleading burden for the element of scienter that is specially imposed by the Private Securities Litigation Reform Act (PSLRA), 15 U.S.C.A. § 78u–4(b)(2)(A)—*does* require weighing the plausibility of competing inferences. *Id.* at 314.

Under the PSLRA's heightened pleading standard, "[i]t does not suffice that a reasonable fact finder plausibly could infer from the complaint's allegations the requisite state of mind." *Id.* In other words, satisfaction of the general pleading standard

is not sufficient to meet "the stricter demand Congress sought to convey in" the PSLRA. *Id.* "Rather," the Court held, "to determine whether a complaint's scienter allegations can survive threshold inspection for sufficiency, a court governed by [the PSLRA] must engage in a comparative evaluation; it must consider, not only inferences urged by the plaintiff, . . . but also competing inferences rationally drawn from the facts alleged." *Id.* Thus, it follows directly from the Court's reasoning in *Tellabs* that the ordinary determination of plausibility, in the absence of a heightened standard imposed by Congress, turns solely on the plausibility of the inferences urged by the plaintiff.

This Court recently applied precisely this distinction in a case applying both the *Iqbal* and *Twombly* standard as to materiality, and the PSLRA's heightened pleading standard for scienter. *See Matrixx*, 131 S. Ct. at 1322–25; *see also* Pub. Justice Ctr., P.C. Amicus Br. 16. In *Matrixx*, this Court's determination of materiality, subject to the general pleading standard, turned on its conclusion that plaintiffs' suggested inference of materiality was "plausible on its face." *Matrixx*, 131 S. Ct. at 1322–23 & n.12. In contrast, when the Court turned to the issue of scienter, subject to the PSLRA's heightened pleading standard, it observed that "[t]his standard requires courts to take into account 'plausible opposing inferences.'" *Id.* at 1324 (citing *Tellabs*, 551 U.S. at 323. The Court held that plaintiffs' suggested inference of scienter was "at least as compelling as any opposing inference one could draw from the facts alleged," after considering the purported "most obvious inference" and "most cogent inference" suggested by de-

fendant and supporting amici. *Id.* at 1324–25 & n.15. Thus, under *Tellabs* and *Matrixx*, a court applying the *ordinary* pleading standard assesses the plausibility of plaintiff's suggested inference; if that inference of liability is plausible, the court does not go on to consider plausible opposing inferences.

If, however, a court determines that "the complaint does not set forth a single fact in a context that suggests" liability, as this Court did in *Twombly*, 550 U.S. at 561–62, and if a non-discriminatory alternative explanation for defendants' conduct is "obvious," the obvious innocent alternative explanation renders plaintiffs' ungrounded suggestion of an improper motive implausible. *Id.*; *see also Iqbal*, 556 U.S. at 683. Thus, under *Iqbal* and *Twombly*, a court may accept an obvious alternative explanation only when it reads the complaint as consistent with, but not actually suggestive of, liability. This approach provides no warrant for the comparative assessment of alternative plausible inferences when the complaint *does* suggest a plausible basis for liability.

Petitioners claim that *Crawford-El v. Britton* suggests that this Court should be especially wary of concluding that a complaint gives rise to a plausible inference of "improper intent." *See* Pet. Br. 49–50 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 584–85 (1998)). A careful reading of *Crawford-El* undermines any such suggestion. There, this Court specifically rejected a heightened pleading requirement for a prison inmate's claim that a prison guard had acted with an improper retaliatory motivation. *Crawford-El*, 523 U.S. at 577–78. A more rigorous standard for subjective intent claims, the Court held,

would create "a rule that places a thumb on the defendant's side of the scales when the merits of a claim that the defendant knowingly violated the law are being resolved." *Id.* at 593. For the same reason, this Court should once again acknowledge that it is not within its purview to adopt such a heightened pleading standard. *Id.* at 596–97; *see also id.* at 601 (Kennedy, J., concurring) ("[T]he authority to propose those far-reaching solutions lies with the Legislative Branch, not with us.").

B. The civil rights implications of this case emphasize the need for care and precision in defining the bounds of plausibility pleading.

The dangers of the heightened pleading requirements advanced by petitioners are especially apparent in the civil rights context. Petitioners' suggested probability pleading standard would be a significant step beyond this Court's decisions in *Twombly* and *Iqbal*, and adopting petitioners' approach would run the risk of functionally eviscerating some of our country's most fundamental constitutional and statutory protections against discrimination. With its decisions in *Iqbal* and *Twombly*, this Court established a filter to protect defendants from what it considered to be bare, unsupported allegations of wrongful intent by requiring plaintiffs to allege facts suggestive of not just a *conceivable* discriminatory motive, but one that, in context, is *plausible*. Beyond that, this Court did not, and should not, venture.

Petitioners' proposed revision of *Iqbal* and *Twombly* could have the unintended consequence of creating a safe harbor for certain types of discrimi-

nation in which defendants' discriminatory conduct is not accompanied by direct evidence of racial motivation. In such cases, perpetrators of genuine civil rights violations could hide behind pretextual—though perhaps appealingly plausible—justifications for their conduct, pointing to the absence of direct evidence of discrimination expressly identified in a complaint. Under petitioners' proposed pleading standard, a court weighing a circumstantial but plausible inference of covert discrimination against the defendant's seemingly reasonable innocent explanation for its conduct might improperly conclude that the plaintiff should not have the opportunity to prove his case.

Some courts of appeals have specifically recognized this risk: "[W]hile discriminatory conduct persists, violators have learned not to leave the proverbial 'smoking gun' behind. . . . '[D]efendants of even minimal sophistication will neither admit discriminatory animus [n]or leave a paper trail demonstrating it.'" *Aman v. Furniture Rental Corp.*, 85 F.3d 1074, 1081–82 (3d Cir. 1996) (quoting *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987)). Petitioners' improper expansion of *Iqbal*'s "obvious alternative" language would create an artificially high barrier, especially for civil rights plaintiffs.

As this Court has long recognized, intentional discrimination claims of the sort at issue here require a close examination of the totality of the circumstances surrounding a contested decision or action. *Arlington Heights*, 429 U.S. at 265–27. In order to address the difficulty of discerning discriminatory purpose, this Court "demands a sensitive inquiry into such circumstantial and direct evidence of

intent as may be available." *Id.* at 266. This "sensitive inquiry" compels the consideration of fact-intensive questions such as the historical background of the decision, the events leading directly up to the decision, the discriminatory effects of the decision, and any procedural or substantive irregularities involved in the decision. *Id.*

Often in civil rights cases, defendants are in exclusive possession of information highly pertinent to this "sensitive inquiry"—through their agents, employees, records, and documents. For a plaintiff to establish that she was the victim of a discriminatory practice, she typically must expose the defendant's "private, behind-closed-doors conduct," including "particular meetings and conversations, which individuals were involved, when and where meetings occurred, what was discussed, and, ultimately, who knew what, when, and why." Howard A. Wasserman, *Iqbal, Procedural Mismatches, and Civil Rights Litigation*, 14 Lewis & Clark L. Rev. 157, 168–69 (2010).

Such evidence often exists, but is rarely in the hands of the plaintiff at the pleading stage, given defendants' ability and willingness to cloak their conduct. For example, the lawsuit brought against the Texaco Corporation in 1994, asserting that Texaco systematically discriminated against minority employees in promotions, and fostered a racially hostile environment, ultimately revealed a particularly vivid example of behind-the-scenes discussions among senior level executives, but this evidence emerged only after the complaint was filed. *See* Kurt Eichenwald, *Texaco Executives, On Tape, Discussed Impeding a Bias Suit*, N.Y. TIMES, Nov. 4, 1996 (de-

scribing a tape recording of Texaco officials referring to employees as "black jelly beans" and other racial epithets). Texaco ultimately settled. *See* Kurt Eichenwald, *Texaco to Make Record Payout In Bias Lawsuit*, N.Y. TIMES, Nov.16, 1996.

The factual asymmetry inherent at the pleading stage precludes plaintiffs from having access to a full complement of such facts at the pleading stage. Wasserman, 14 Lewis & Clark L. Rev. at 168. Without depositions and other discovery tools, or the all-too-rare revelations from a whistleblower, it is extremely costly—and often impossible—for plaintiffs to obtain specific facts to substantiate a defendant's state of mind, even with support from the most capable and committed lawyers. *See id.* A heightened approach to pleading ignores these unfortunate realities and therefore places meritorious civil rights claims in serious jeopardy. *See* Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 Notre Dame L. Rev. 849, 879 (2010) ("[S]trict pleading will screen some meritorious suits, even ones with a high probability of trial success but a probability that is not evident at the pleading stage before access to discovery."); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 Ind. L. J. 119 (2011) (providing empirical evidence to demonstrate that stricter pleading standards do not improve lawsuit quality). In many cases, the merits of a plaintiff's allegations of discrimination simply cannot be adjudged at the pleading stage as they would at a later phase of litigation, after a plaintiff has been afforded the critical benefit of discovery.

Here, Petitioners' suggested weighing of relative plausibility at the pleading stage puts an unfair burden on respondents to do more than establish a plausible inference of liability. If petitioners' suggested standard were adopted, it would turn plausibility pleading into a pre-discovery proxy for trial. Such an approach is inconsistent with *Iqbal*, and is entirely unwarranted.

Petitioners' approach would also create serious obstacles for plaintiffs who, already challenged by the information asymmetry that they face at the pleading stage, must establish the plausibility of discrimination claims of a sort that may be initially counterintuitive to the personal experience of the judges evaluating them. The Third Circuit has recognized the dangers of prematurely appraising a claim of discrimination. *See Aman*, 85 F.3d at 1081–82 ("Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior."). In civil rights cases, it is particularly important for judges to have the opportunity to review factual evidence before rendering judgments about the relative probability of even equally plausible alternatives.

A powerful example of the necessity of facts to overcome the personal experience of a particular judge arose in *Swann v. Charlotte-Mecklenburg Board of Education*, a landmark school desegregation case litigated by LDF. In a published opinion, the district judge explained the evolution of his own

perspective as the facts were developed through litigation of the case:

> The case was difficult. The first and greatest hurdle was the district court. The judge, who was raised on a cotton farm which had been tended by slave labor in his grandfather's time, started the case with the uninformed assumption that no active segregation was being practiced in the Charlotte-Mecklenburg schools, that the aims of the suit were extreme and unreasonable, and that a little bit of push was all that the Constitution required of the court.

Swann v. Charlotte-Mecklenburg Bd. of Educ., 66 F.R.D. 483, 484–85 (W.D.N.C. 1975). Yet, after the plaintiffs presented reams of evidence to support their claims, "they produced a reversal in the original attitude of the district court." *Id.*

Thankfully, few judges today have to overcome the background assumptions common in the Jim Crow era. Despite the progress that our nation has made, however, discrimination persists in education, employment, the housing market, and the criminal justice system. *See, e.g.*, Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 39 Education Researcher 59 (2010); Amy Armstrong et al., The High Cost of Segregation: Exploring the Relationship Between Racial Segregation and Subprime Lending, Furman Ctr. for Real Estate & Urban Policy (2009) (discussing discrimination in mortgage markets); Jennifer Eberhardt et al., *Looking Deathworthy: Perceived Stereotypicality of Black Defendants Predicts Capital-*

Sentencing Outcomes, 17 Psychological Sci. 383 (2006) (finding that "in cases involving a White victim, the more stereotypically Black a defendant is perceived to be, the more likely that person is to be sentenced to death."). In *McReynolds v. Merrill Lynch*, the continued salience of race in the workplace was aptly described by Judge Posner, who concluded that Merrill Lynch's policy of allowing brokers to form their own teams potentially constituted a discriminatory policy:

> The teams, they say, are little fraternities (our term but their meaning), and as in fraternities the brokers choose as team members people who are like themselves. If they are white, they, or some of them anyway, are more comfortable teaming with other white brokers. Obviously they have their eyes on the bottom line; they will join a team only if they think it will result in their getting paid more, and they would doubtless ask a superstar broker to join their team regardless of his or her race. But there is bound to be uncertainty about who will be effective in bringing and keeping shared clients; and when there is uncertainty people tend to base decisions on emotions and preconceptions, for want of objective criteria.

McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 672 F.3d 482, 488 (7th Cir. 2012). The case subsequently settled. Settlement Agreement and Release, *McReynolds v. Merrill Lynch*, No. 05-CV-6583 (N.D. Ill. Dec. 6, 2013) (outlining $160 million settlement of systematic discrimination claims).

No one doubts that all federal judges believe in principles and norms of anti-discrimination, and some even have firsthand experience with civil rights litigation, as attorneys or even plaintiffs. *See Wilkins v. Maryland State Police*, No. MJG-93-468 (D. Md. 2003) (Robert Wilkins, now a Judge on the D.C. Circuit, was the named plaintiff in a class action contending that the Maryland State Police violated constitutional rights by stopping, detaining, and searching African Americans pursuant to a racial profiling policy used by defendants as part of their drug interdiction efforts).

Yet empirical studies have shown that judges, regardless of their background and just like everyone else, are susceptible to errors if they rely too heavily on intuitive rather than deliberative decision-making. Intuition tends to be heavily influenced by personal experiences, which may or may not vary from those of the plaintiff in a particular case. If unchecked, these intuitive, cursory decision-making processes can then preclude the appropriate, deliberate evaluation of a complaint. *See generally Dual-Process Theories in Social Psychology* (Shelly Chaiken & Yaacov Trope eds., 1999) (providing a collection of articles on various dual-process theories). Intuitive processes occur quickly and automatically, while deliberative processes are "rule-governed, effortful, and slow." Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L. Rev. 1, 27 (2007). While necessary in our everyday lives, intuitive thinking, as researchers have long observed, can result in "severe and systematic errors." Amos Tversky & Daniel Kahneman, *Judg-*

ment Under Uncertainty: Heuristics and Biases, 185 Sci. 1124 (1974).

Judges are not immune to either the lure of intuitive decision-making or the errors that often follow. Guthrie et al., 93 Cornell L. Rev. at 27. In cases involving familiar legal issues, for example, or statistical inferences, empirical research demonstrates that judges were more likely to engage in intuitive rather than deliberative decision-making process—and to reach incorrect outcomes. *Id.* at 122; *see also* Amos Tversky & Daniel Kahneman, *Judgments of and by Representativeness*, in Judgment under Uncertainty: Heuristics and Biases 84, 84–85 (Daniel Kahneman et al. eds., 1982). Intuitive decision-making is also the route by which factors like race or gender may affect the legal system. *See* Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 Cal. L. Rev. 969, 976 (2006) (describing how race operates to trigger intuitive judgments).

Just as a judge must understand economic context to determine the plausibility of an antitrust claim, rather than merely rely upon personal experience, a judge considering a discrimination claim may be required to rethink the "baseline assumption that unlawful discrimination is rare and that when employees are fired . . . the natural explanation is that their employers had a perfectly legal reason to do so. . . ." Edward A. Hartnett, *Taming* Twombly, 158 U. Pa. L. Rev. 473, 502 (2010). And to the extent that *Iqbal* and "*Twombly* suggest[ ] that litigants seek directly to undermine this baseline assumption [about what unlawful discrimination looks like] with social science research," *id.* at 503, this Court should confirm the relevance of such evidence, and allow

plaintiffs to demonstrate plausibility through whatever means are reasonably calculated to do so. This Court itself has noted the importance of context when assessing claims of discriminatory intent. *See Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (per curiam) (overturning the court of appeals' conclusion that supervisors' act of calling a black man "boy" had no racial implications, and urging consideration of "context," "local custom," and "historical usage").

Otherwise, a civil rights plaintiff—placed in a factually disadvantageous position and forced to overcome what may be a judge's personal intuition about the prevalence of discrimination in contemporary society—will be expected to provide more direct and damning evidence than is feasible or practical at the pleading stage, and may be functionally denied judicial recourse for more clandestine or subtle forms of discrimination. *See, e.g.*, Diane M. Mackie et al., *Social Psychological Foundations of Stereotype Formation*, *in* Stereotypes and Stereotyping 41, 42–43 (C. Neil Macrae et al. eds., 1996); Lincoln Quillian, *New Approaches to Understanding Racial Prejudice and Discrimination*, 32 Ann. Rev. Sociol. 299 (2006).

This Court's pleading standard should ensure that individuals alleging forms of discrimination that may be meritorious under constitutional and statutory norms have an opportunity to proceed beyond the pleading stage. *See Twombly*, 550 U.S. at 558. Adopting petitioners' approach has the potential to inadvertently shield from liability perpetrators of discrimination that this Court and this country have a compelling interest in eradicating.

C. Respondents' allegations give rise to a plausible inference of viewpoint discrimination, and dismissal at the pleading stage is therefore unwarranted.

Petitioners' argument that this case fails to satisfy *Iqbal*'s plausibility standard should be rejected in light of the factual allegations proffered by respondents in their Second Amended Complaint ("SAC"), for the reasons explained in more details by Respondents. *See* Resp. Br. 15–31. Secret Service agents possess unquestioned authority to establish a security perimeter to protect the President, and an undoubtedly compelling interest in Presidential security. Respondents, however, assert specific allegations plausibly suggesting that petitioners intentionally treated them differently because of their viewpoint. Petitioners' invocation of security as a plausible explanation for their behavior does not render implausible respondents' suggested inference that petitioners took respondents' viewpoint into account.

Respondents allege in the SAC that petitioners ordered peaceful demonstrators to move two blocks away from the Inn where President George W. Bush was dining, and did so in close temporal proximity to when their chants became audible to the President; this forced movement kept the President from hearing respondents' protest message during dinner, or from seeing their protest signs when he departed the restaurant in his motorcade. SAC ¶¶ 42, 61, 55 77.

According to the SAC, petitioners required the anti-Bush protesters to move from their original location, which was screened from the President's din-

ner by several buildings and a wooden fence. *Id.* at 50–51. Petitioners allowed demonstrators supporting the President to remain where they stood, only a matter of feet farther from where the President dined than respondents' original location, where their demonstration in favor of the President could be heard at dinner, and observed by the President upon his departure. *Id.* at 48, 55–57. Moreover, Petitioners did not in any way move, or even screen, diners in the Inn where the President dined. *Id.* at 52, 55. Petitioners targeted only the anti-Bush group, moving them, and only them, out of the President's earshot and out of sight of the President, and of the media, when the President's motorcade pulled away from the Inn. SAC ¶¶ 53, 56. These factual allegations present a plausible basis to infer that petitioners were not motivated solely by grave security concerns with no connection to respondents' viewpoint.

Respondents further allege that Secret Service agents had engaged in a pattern and practice of similar viewpoint discrimination on a dozen recent occasions; they also allege that an official training manual of the President's Advance Team specifically directed the Team to "work with the Secret Service" to have protestors placed out of view of the President and the media, and to place supportive "rally squads" in front of the media. Pet. App. 219a.[3]

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[3] Petitioners argue that the manual only applies to "ticketed events," Pet. Br. 19, failing to acknowledge that the preface to the manual states that "the principles and guidelines covered in [this] manual can be applied to any type of event," Pet. App. 215a, and thus are not limited to ticketed events.

These factual allegations, taken as true, buttress the plausibility of the agents' viewpoint discrimination in this case. In a similar circumstance, this Court has held relevant to assessing the plausibility of materiality various allegations in a complaint that were admittedly not statistically significant, were only suggestive of causation, and were based on studies of what defendants asserted to be the effect of different chemicals and in fish rather than humans. *Matrixx*, 131 S. Ct. at 1319–24 & n.13. Nonetheless, these factual allegations were held to establish a plausible inference of materiality, and, "taken collectively," id. at 1324, to provide compelling evidence of scienter.

Accordingly, respondents readily meet *Iqbal*'s plausibility pleading standard. Petitioners' claim that respondents were moved only because they happened to be the group closest to, and therefore most dangerous to, the President, *see* Pet. Br. 17, is a competing inference that need not be considered at the pleading stage, given the plausible inference in favor of respondents.

Petitioners' proffered explanation for their challenged conduct is one possible way to understand their conduct, but it is not the only plausible inference arising from the facts. This Court has specifically affirmed that a complaint may be plausible "even if doubtful in fact." *Twombly*, 550, U.S. at 556; *see also Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515 (2002) ("Indeed it may appear on the face of the pleadings that a recovery is very remote and unlike-

ly but that is not the test.") (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).[4]

Whatever this Court's eventual disposition of this case, or its approach to qualified immunity, respondents have established the plausibility of differential treatment on the basis of viewpoint.

II. Petitioners distort the pleading requirements for intentional discrimination.

In addition to misapplying the pleading standard under *Twombly* and *Iqbal*, petitioners advance arguments founded upon misapprehensions of the law governing the substance of respondents' allegations. Specifically, petitioners mischaracterize the legal standard for intentional discrimination, contending that they acted unlawfully only if viewpoint discrimination was their sole motivation, and misconstrue how plausibility pleading functions in the context of intentional discrimination claims.

Petitioners mistake a *justification* for their viewpoint-conscious decision-making with an *alternative explanation* for their conduct. A legal justification for viewpoint-conscious conduct does not render implausible the respondents' asserted inference that petitioners took their viewpoint into account; indeed, petitioners' arguments justifying such viewpoint-conscious conduct make the inference of that conduct

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[4] *Twombly* and *Iqbal* reaffirm the continuing vitality of *Swierkiewicz*. Both decisions cite favorably to *Swierkiewicz*. *See Iqbal*, 556 U.S. at 662; *Twombly*, 550 U.S. at 544. This Court has also subsequently cited favorably to *Swierkiewicz* in other cases involving Rule 8. *See, e.g.*, *Skinner v. Switzer*, __ U.S. __, 131 S. Ct. 1289, 1296 (2011).

more plausible. The plausible inference of viewpoint-conscious conduct ends the inquiry; petitioners' legal justifications regarding security concerns are complex, fact-intensive, and thus unsuitable for resolution at the pleading stage.

A. Respondents need only plead that their political viewpoint played some role in petitioners' actions, not that it was petitioners' sole motivation.

In order to state a claim for intentional discrimination, a plaintiff "must plead sufficient factual matter to show" that a policy or action was adopted or implemented on the basis of a protected characteristic. *Iqbal*, 556 U.S. at 677. This Court has long made clear that, in order to demonstrate discriminatory intent, a plaintiff must establish that the challenged actions occurred *because of*, and not merely *in spite of*, a protected characteristic. *See id.* (quoting *Pers. Admin'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979)) ("[P]urposeful discrimination requires more than . . . 'intent as awareness of consequences.'"). Moreover, the Court has never required a showing of malice. *See, e.g., Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 269–70 (1993). It simply requires a purpose that focuses upon a protected group by reason of *the protected characteristic itself*. *Id.*

Further, for constitutional claims, a discriminatory motive need not be the only, or even predominant, factor in the ultimate action—a plaintiff need only show that "a discriminatory purpose has been *a motivating factor* in the decision." *Arlington Heights*, 429 U.S. at 265 (emphasis added). Once discrimination "has been shown to be a 'substantial' or 'moti-

vating' factor," a defendant becomes responsible for establishing that the same decision would have been made without the impermissible motivation. *Hunter v. Underwood*, 471 U.S. 222, 228 (1985) (citing *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)); *see also Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 179 n.6 (2009) (noting the motivating factor approach in *Mt. Healthy* and other constitutional cases).

Petitioners present at least two arguments that contravene this well-established standard. First, they imply that respondents are required to show that they were "moved . . . solely to suppress a disfavored viewpoint, and not for any security reason." Pet. Br. 38. Second, they suggest that, by ordering "all persons" beyond a specified perimeter, petitioners were necessarily acting in a viewpoint-neutral manner. *Id.* at 40. The first argument misstates the doctrine; the second mischaracterizes the facts alleged by respondents in the SAC.

Both arguments disregard the possibility that petitioners had mixed motivations, and imply that respondents' factual allegations must entirely preclude the role of legitimate, non-discriminatory security concerns. *See Hunter*, 471 U.S. at 232 (holding that a parallel, permissible motive does not "render nugatory" a discriminatory purpose). To the contrary, in order to prevail on their motion to dismiss under the plausibility standard, *petitioners*, as defendants below, must establish that their actions were obviously and entirely non-discriminatory. Accepting the facts alleged by respondents as true, petitioners cannot make any such definitive showing.

From the facts alleged by respondents, at least five inferences can be drawn: (1) petitioners moved respondents because of entirely viewpoint-neutral security concerns arising from respondents' proximity to the President; (2) petitioners moved respondents because they personally disagreed with respondents' viewpoint and subjectively desired to suppress their message; (3) petitioners moved respondents because they believed it was their professional duty to avoid having the President, and the media covering the President, exposed to respondents' speech, at dinner or on the motorcade route; (4) petitioners moved respondents for security reasons, but made those security determinations at least partially as the result of a viewpoint-conscious belief that those expressing an anti-Bush viewpoint presented an increased security risk; or (5) petitioners moved respondents as the result of a combination of these various motives.

Respondents' complaint should be dismissed only if the first inference is so obvious as to render the other four possibilities all utterly implausible. It is entirely plausible that discovery might lead to relevant evidence of something other than the first possibility, given the doubts and questions regarding petitioners' viewpoint-neutral explanation—most notably, the differential treatment of respondents as compared to the pro-Bush supporters and those not expressing any viewpoint—and taking into account the viewpoint-conscious Advance Manual, as well as the twelve analogous incidents of Secret Service viewpoint discrimination. *See* Section I.C *supra*. In order to survive a motion to dismiss, respondents need not allege, as petitioners intimate, that legiti-

mate security concerns did not play *any* role in petitioners' actions, but merely that viewpoint plausibly played *some* role.

Even petitioners' problematic framing of the issues is less troubling, though, than the erroneous views of the judges dissenting from denial of rehearing en banc in the Ninth Circuit. The dissenters lamented the "complaint's lack of plausible allegations showing that the Secret Service agents in this case explicitly acted with a subjective intent to suppress the protestors' message. . . ." Pet. App. 21a. This blunt characterization of discrimination fully ignores the last three of the possible inferences described above, misconstruing the substantive scope of viewpoint discrimination and therefore failing to properly evaluate the plausibility of respondents' claims. Focusing on what they considered to be a questionable proposition that petitioners themselves personally harbored a subjective intent to suppress respondents' message, the Ninth Circuit dissenters improperly disregarded other, non-malicious but still viewpoint-conscious, explanations for the conduct described in respondents' complaint.

Although viewpoint discrimination requires that a speech restriction be motivated by the consideration of viewpoint, the plaintiff need not demonstrate "hostility to particular points of view, or a desire to suppress certain subjects." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 677 (1994) ("[B]enign motivation . . . is not enough to avoid the need for strict scrutiny of content-based justifications."). In this and other contexts, the Court's definition of intentional discrimination extends far beyond actions taken maliciously or with a bare desire to harm. Even

an occupational restriction that seeks to *protect* women and their health is still a sex-based classification requiring sufficient justification to withstand judicial scrutiny. *Int'l Union, United Auto., Aerospace, and Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 197 (1991).

In any intentional discrimination suit, the threshold question is not whether the actor seeks to harm through the use of a protected characteristic, but whether consideration of the protected characteristic was a motivating factor in the course of action. *See, e.g., Ricci v. DeStefano*, 557 U.S. 557, 579 (2009); *Johnson Controls*, 499 U.S. at 197; *Feeney*, 442 U.S. at 277. By mischaracterizing the nature of discriminatory intent—and, more importantly, obfuscating the scope of decision-making by petitioners that would qualify as viewpoint discrimination—petitioners misstate the necessary substantive elements of a viewpoint discrimination claim and misconstrue the plausibility of an inference that petitioners' conduct was, at least in part, motivated by respondents' viewpoint.

B. An asserted legal justification for disparate treatment based upon a protected characteristic differs from an "alternative explanation" for such treatment.

Petitioners also confuse the law regarding claims of intentional discrimination by conflating a defendant's asserted legal *justification* for disparate treatment with an alternative, non-discriminatory *explanation* for that conduct. What petitioners offer in their alternative argument in Sections B.3 and B.4 of their brief is a possible legal justification, given the

purported connection between viewpoint and security, for treating respondents differently because of their viewpoint, not a non-discriminatory explanation for their conduct.

Petitioners apparently recognize the plausibility of respondents' factual allegation that they considered respondents' viewpoint in determining to move them farther from the President. Indeed, in addition to their contention that there is no plausible basis to believe viewpoint played any role in their conduct, Sections B.3 and B.4 of petitioners' brief provide an asserted legal *justification* for viewpoint playing a role in their conduct: it was constitutionally legitimate for petitioners to move respondents, they argue, because those peacefully opposing the President's policies raise more security concerns than those supporting those policies or those not expressing a political viewpoint. Petitioners expressly argue that, even if "petitioners' decision to relocate respondents' group had some connection to the group's anti-Bush message . . . the general principle against 'viewpoint discrimination' would still fail to clearly establish the unconstitutionality of petitioners' actions." Pet. Br. 17.

If respondents' viewpoint was a motivating factor in petitioners' course of action, however, viewpoint discrimination occurred. *See, e.g.*, *Feeney*, 442 U.S. at 277. The discrimination might ultimately prove legally justifiable—if, e.g., petitioners show that respondents' viewpoint, given their location, presented a legitimate security concern, and that there was no way to address that concern that was less restrictive of respondents' First Amendment interests. But because it is entirely plausible that petitioners' securi-

ty concerns took respondents' viewpoint into account, as petitioners' alternative argument effectively acknowledges, *Iqbal* does not authorize a reviewing court to make the fact-intensive assessment of the legitimacy of security justification and the existence of less restrictive alternatives at the pleading stage.

In *Iqbal*, this Court reiterated its longstanding view that intentional discrimination involves a course of action taken "because of" its effects on an identifiable group, not merely "in spite of" those effects. *Iqbal*, 556 U.S. at 676–77 (quoting *Feeney*, 442 U.S. at 279). In the wake of the September 11 terrorist attacks, this Court observed that "[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Iqbal*, 556 U.S. at 682.

In this Court's view, the defendants' nondiscriminatory motivation to find those responsible for September 11 provided an "obvious alternative explanation" for a high number of arrests of Arab Muslims. *Id.* (citing *Twombly*, 550 U.S. at 567). Yet this Court in no way authorized a program targeting Arab Muslims as a group based upon some generalized belief that they were more likely to be involved in acts of terrorism. That scenario would present a modern-day version of *Korematsu v. United States*, 324 U.S. 885 (1945). Such decision-making would cross firmly into the realm of intentionally discriminatory conduct, or at the very least raise complex,

fact-sensitive issues not amenable to resolution on a motion to dismiss.

Neither *Iqbal*, nor any other precedent, suggests that a defendant may invoke a plausible, valid concern such as security, and thereby earn a free pass from potential liability for having acted, at least in part, on the basis of a protected characteristic. Petitioners' contention that they moved respondents for security-related reasons, even if true, does not provide an "alternative" to respondents' claims; rather, it plausibly encompasses what may be a justification for their viewpoint-conscious decision. Just as *Iqbal* stops well short of sanctioning the disparate treatment of Arab Muslims as a group based on some presumed heightened threat, the Constitution does not allow for the wholesale differential treatment of anti-Bush demonstrators (or, more precisely, those standing with anti-Bush demonstrators), as compared to pro-Bush protesters and those not expressing any political viewpoint.

This Court "time and again has held content-based or viewpoint-based regulations to be presumptively invalid," *Hill v. Colorado*, 530 U.S. 703, 769 (Kennedy, J., dissenting) (citations omitted), and has never suggested wholly eschewing freedom of speech concerns at the pleading stage at the plausible mention of security. Determining whether petitioners' actions in this particular context can ultimately be justified, given the security concerns involved, is a far different and more difficult question than whether respondents have plausibly stated a claim for viewpoint discrimination. While the latter question is properly the focus of the analysis at the pleading

stage, the former requires further review at subsequent stages in the litigation.

When a plaintiff approaches the courthouse doors with a factually specific and plausible claim that she has been treated differently on the basis of her viewpoint or other protected characteristic, this Court should ensure a careful, analytical, and full assessment of the rights and interests involved. Petitioners' suggested revision of plausibility pleading short circuits such an analysis.

CONCLUSION

For the foregoing reasons, if the Court reaches the issue of whether respondents satisfied the plausibility pleading requirement set forth in *Iqbal* and *Twombly*, it should affirm the judgment of the Ninth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

TIM WOOD AND ROB SAVAGE,
Petitioners,

v.

MICHAEL MOSS, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/ COUNTY MANAGEMENT ASSOCIATION, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, AND NATIONAL SHERIFFS' ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF THE AMICI CURIAE[1]

The National Conference of State Legislatures (NCSL) is a bipartisan organization that serves the legislators and staffs of the nation's 50 States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and Federal agencies, and regularly submits amicus briefs to this Court in cases, like this one, that raise issues of vital state concern.

The National League of Cities (NLC), founded in 1924, is the oldest and largest organization representing municipal governments throughout the United States. Working in partnership with 49 state municipal leagues, NLC serves as a national advocate for the more than 19,000 cities, villages, and towns it represents. Its mission is to strengthen and promote cities as centers of opportunity, leadership, and governance.

The National Association of Counties (NACo) is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The International City/County Management Association (ICMA) is a nonprofit professional and

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. No counsel for any party has authored this brief in whole or in part, and no person or entity, other than the amici and their counsel, has made a monetary contribution intended to fund the preparation or submission of this brief. *See* Rule 37.

educational organization of over 9,000 appointed chief executives and assistants serving cities, counties, towns, and regional entities. ICMA's mission is to create excellence in local governance by advocating and developing the professional management of local governments throughout the world.

The U. S. Conference of Mayors (USCM), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.

The International Municipal Lawyers Association (IMLA) has been an advocate and resource for local government attorneys since 1935. Owned solely by its more than 3,000 members, IMLA serves as an international clearing-house for legal information and cooperation on municipal legal matters.

The National Sheriffs' Association is a 26 U.S.C. § 501(c)(4) non-profit formed in 1940, which promotes the fair and efficient administration of criminal justice throughout the United States; and, in particular, in advancing and protecting the Office of Sheriffs throughout the United States. The Association has over 21,000 members and is the advocate for over 3,000 sheriffs located through-out the United States. The National Sheriffs' Association promotes the public interest goals and policies of law enforcement in the nation, and it participates in judicial processes where the vital interests of law enforcement and its members are being affected.

The amici represent the interests of state and local law enforcement, including some, like the Secret Service, who act as bodyguards, *e.g.*, state troopers

who protect governors, or city police who protect mayors and other officials. State and local law enforcement entities also keep the peace and protect public order and safety during political protests and similar situations. Thus, the state and local law enforcement officers represented by amici frequently encounter situations similar to the one at issue in this case. State and local governments also face backlash and lawsuits for viewpoint discrimination over law enforcement decisions that were not undertaken with any discriminatory intent, but only to protect individuals and maintain public safety.

SUMMARY OF THE ARGUMENT

A Google Maps Street View tour confirms an obvious alternative explanation for moving the protesters. The relatively new rule of *Twombly/Iqbal* requires courts to consider the underlying situation from the defendant's perspective, to determine if there is an "obvious alternative explanation" for the defendant's conduct that justifies qualified immunity. Here, the Court can and should view the protest from the perspective of the Petitioner Secret Service Agents by taking a tour of the area using Google Maps Street View. By considering the geographic and architectural features revealed by Google Maps, the Court can readily appreciate that the Secret Service Agents had sound security-based reasons for moving the anti-Bush protesters on the corner of Fourth and California Streets further away from the President.

Content of speech may be considered here. Because this case involves the protection of the President during an outdoor and unscreened political protest, this is a rare situation where a qualified

immunity analysis can properly take into consideration the content of the protesters' speech. The Secret Service Agents were entitled to consider how a threat to the President was more likely to emerge from the group of Bush protesters than from the group of supporters—another justification for moving the protesters further away from the President than the corner of Fourth and California Streets.

The proper level of generality must take into consideration the Agents' security concerns. Defining the constitutional right at too high a level of generality is a common qualified immunity problem. Here, determining the proper level of generality/specificity requires taking account of the overriding security concerns that necessarily drove the Secret Service Agents' decisions.

ARGUMENT

I. Rather than limit itself to the two-dimensional map in the record, this Court should use Google Maps Street View to examine the actual geographic and architectural facts on the ground, as encountered by the Secret Service Agents, in evaluating the protesters' viewpoint discrimination claim.

For the Ninth Circuit majority, the anti-Bush protesters were unconstitutionally "disadvantaged" when they were moved farther away from the President than the pro-Bush supporters, because the greater distance between the demonstrators and the President made it more difficult for the demonstrators to communicate their message to the President. App. 37a (inferring that because the protesters were moved one block "farther from where

the President was dining" than the Bush supporters, the protesters must have been "less able to communicate effectively with the President, media, or anyone else inside or near the Inn").

The Ninth Circuit opinions and the briefing by the parties contain many verbal descriptions of the three relevant blocks along California Street. The record and the Ninth Circuit opinion also contain a simple two-dimensional map prepared by the Respondent protesters. App. 59a. The protesters offered this map to help establish the relative distances. The map puts the events onto a set of Cartesian coordinates so the Court can measure relative distances between the two groups and the President.

The Court can and should do much more than view the record map to determine relative distances. It should examine the three blocks of downtown Jacksonville at issue via Google Maps Street View, to get a much more detailed sense of the geographic and architectural facts on the ground, as confronted by the Petitioner Secret Service Agents.

This Court has recognized the value of making reference to available objective facts in qualified immunity cases where the Court must evaluate the conduct of government actors based on claimants' allegations. In *Scott v. Harris*, 550 U.S. 372 (2007), this Court considered a qualified immunity defense that hinged upon two radically different interpretations of a car chase. The claimant was fleeing police when he was forced off the road by a police car, and became paralyzed as a result. He sued the police, claiming that they unlawfully used lethal force to apprehend him. *Id.* at 375-76. So, the reasonableness of the police officers' actions depended heavily on the circumstances of the car chase. The claimant

described his driving as careful and nonthreatening, whereas the police officers described a dangerous high-speed chase. *Id.* at 378-80.

The Court deemed it appropriate to inform its determination of reasonableness by viewing an indisputably accurate videotape of the car chase. *Id.* The videotape confirmed that the police officers' version of the chase was factually accurate—"Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury." *Id.* at 380. Thus informed, the Court had no difficulty determining that the police did not violate the claimant's Fourth Amendment rights by hitting his bumper with a police cruiser. *Id.* at 380-86.

So far, neither side has approached this qualified immunity case through lens of *Scott v. Harris*. Nor did the Ninth Circuit. But this Court's approach to qualified immunity in *Scott v. Harris* can be usefully applied here by carefully considering the facts from the perspective of the Secret Service Agents, as aided by the objective details provided by the street-level photographs available from Google Maps Street View.

Federal courts have long deemed it appropriate to take judicial notice of geographical facts as observed through resources like Google Maps. *See* Fed. R. Evid. 201(b); *Boyce Motor Lines v. United States*, 342 U.S. 337, 344 (1952) (Jackson, J., dissenting) ("We may, of course, take judicial notice of geography."); *United States v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012) (taking notice of a Google map and satellite image as a "source whose accuracy cannot reasonably be questioned"); *Citizens for Peace in Space v. City of*

Colorado Springs, 477 F.3d 1212, 1218 n.2 (10th Cir. 2007) (taking judicial notice of online distance calculations); *Rindfleisch v. Gentiva Health Sys., Inc.*, 752 F. Supp. 2d 246, 259 n.13 (E.D.N.Y. 2010) (taking judicial notice of geographic information through Google Maps, and collecting similar cases); *United States v. Brown*, 636 F. Supp. 2d 1116, 1124 n.1 (D. Nev. 2009) (same); David J. Dansky, *The Google Knows Many Things: Judicial Notice in the Internet Era*, 39 COLO. LAW. 19, 24 (2010) ("Most courts are willing to take judicial notice of geographical facts and distances from private commercial websites such as MapQuest, Google Maps, and Google Earth."). And this Court has acknowledged that courts may consider judicially-noticed facts at the pleading stage, in deciding a motion to dismiss. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).[2]

Google Maps' Street View feature consists of "panoramic, street-level photographs . . . captured by cameras mounted on vehicles owned by Google that drive on public roads and photograph their surroundings." *Joffe v. Google, Inc.*, No. 11–17483, 2013 WL 6905957, at *1 (9th Cir. Dec. 27, 2013), *aff'g In re Google Inc. St. View Elec. Commc'n Litig.*, 794 F. Supp. 2d 1067 (N.D. Cal. 2011) (rejecting Wiretap Act challenges to Street View based on its collection of Wi-Fi information). As a result, Google Maps Street View is not some sort of computer simulation. Rather, it provides a collection of numerous street-level photographs of a location—just as the videotape of the car

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[2] The absence in this case of a party request to judicially notice Google Maps Street View does not prevent the Court from doing so, since courts may take judicial notice *sua sponte*. *See* Fed. R. Evid. 201(c)(1); *e.g.*, *United States v. Harris*, 331 F.2d 600, 601 (6th Cir. 1964) (per curiam).

chase in *Scott v. Harris* consisted of individual frames that were photographs of the car chase.

Since Google Maps did not start collecting photographs until 2007, it is certain the photographs of downtown Jacksonville shown through Street View were taken several years after the October 2004 demonstration at issue here. However, the Street View photographs show the exact same buildings, alleyways, parking lots, and fenced-off patio depicted in the record map, App. 59a, and described at length in the Second Amended Complaint and lower court opinions. It is apparent that there has been no construction or other alteration of these key architectural features since October 2004. The current Google Map Street View photographs are therefore a proper subject of judicial notice under Rule 201(b), *Scott v. Harris*, and the more recent internet map cases cited above.

The Second Amended Complaint alleges that about 200-300 anti-Bush demonstrators congregated along California Street between Third and Fourth Streets, focused on the Third Street motorcade route. App. 172a-81a (Second Amended Complaint facts section) at ¶¶ 42, 44. A similarly sized group of pro-Bush supporters had congregated on California on the other side of Third Street (the west side). *Id.* at ¶ 46. Then President Bush made the decision to stop at the Jacksonville Inn, so he could dine on the outdoor patio at the rear of the Inn. *Id.* at ¶ 47. This unscheduled decision required the Secret Service to immediately and quickly do whatever they could to best secure the back patio location.

It is at this point that the Respondent protesters begin describing the situation in terms of "equal access" to the President, as measured by the two-

dimensional physical distance between each group of protesters and the President. *Id.* at ¶ 48. This two-dimensional, overhead view is critical to the protesters' ability to articulate a constitutional claim based on the fact that they were moved about a block further away from the patio where the President was dining. This view, however, glosses over or obscures some important architectural and geographic features that plainly justify the Secret Service's decision to move the protesting group all the way to Fifth Street.

The protesters allege that police cleared and blocked the two alleys on Third and California Streets leading to the outdoor patio. *Id.* at ¶ 49. As a result, the protesters claim that they did not have any "access to the President or line of sight to the dining patio." *Id.* at ¶ 50. The protesters also allege that they were effectively "blocked" by the buildings along the north side of California Street, *id.*; and that there was "no significant security difference between the two groups of demonstrators." *Id.* at ¶ 54. Like the car chase videotape in *Scott v. Harris*, Google Maps Street View photographs show that these allegations are profoundly inaccurate.[3]

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[3] Google Maps Street View is easy to navigate. Here's one way to do it: go to www.maps.google.com. In the query box, type "Third and California Streets, Jacksonville OR." Then click and drag the person icon (the "pegman") from the lower right hand corner of the screen to the intersection of Third and California. Then view the many street-level photographs taken by Google's cameras by using the arrow icons on the street, and the rotate view icon at the lower right of the screen. The effect is like being able to walk around the streets of downtown Jacksonville—a virtual tour that (as discussed above) is sufficiently objective and accurate to be a proper subject of judicial notice.

Amici suggest that the Court start its tour at the corner of Third and California Streets, and make its way east from there. The pro-Bush supporters were gathered at the northwest corner of this intersection. In terms of security, the most obvious architectural fact the protestors gloss over is that the United States Hotel, a two-story brick building, stands squarely between the pro-Bush demonstrators on this corner and the patio where the President was dining. Any threat posed by demonstrators carrying handguns or explosives would be completely blocked by this edifice.

Now move east along California Street, towards the Jacksonville Inn (on the north side of the street). This is where the anti-Bush protesters were gathered. After the United States Hotel, one passes a small one-story building identified as the "Bijou" in the record map at 59a. Then comes the Jacksonville Inn, followed by the access alley that was blocked by police. This alley on California Street is at least two feet wider than the one on Third Street that the pro-Bush demonstrators were closer to, and provides much more direct access to the outdoor patio than the Third Street alley. These facts provide a sound reason for the Secret Service's decision to clear California Street, which under the circumstances meant moving the anti-Bush protesters at least to the corner of California and Fourth Streets, away from the Bush supporters.

The Ninth Circuit previously ruled in *Moss I* that the act of clearing California Street between Third and Fourth Streets was not enough to make out a cognizable claim of First Amendment retaliation. Under the Ninth Circuit's view, the pro-Bush group at Third and California and the anti-Bush group at Fourth and California were both roughly equidistant

from the President, so everything looked even-handed. The anti-Bush group was not "disadvantaged" by being moved to the corner of Fourth and California. App. 29a; *Moss v. U.S. Secret Service*, 572 F.3d 962, 971 (9th Cir. 2009).

On remand from *Moss I*, the protesters purported to remedy their claim by filing a Second Amended Complaint that added allegations that they were moved to California and Fifth Streets, a block further away from the President than the pro-Bush demonstrators, and thus were comparatively disadvantaged in their expressive activities. App. 180a-81a, Second Amended Complaint ¶¶ 60-62. The Ninth Circuit majority in *Moss v. U.S. Secret Service*, 675 F.3d 1213 (9th Cir. 2012) considered these new allegations key to stating a First Amendment retaliation claim, because there was supposedly no plausible explanation for moving only the anti-Bush protesters an additional block away from the President. App. 5a, 40a-41a.

The Court can now use Google Maps Street View as an objective tool to evaluate the lower courts' analysis, just as it did with the car chase video in *Scott v. Harris*. As noted, a pro-Bush demonstrator at Third and California looking toward the outdoor patio where the President dined would find himself or herself looking at the two-story brick façade of the United States Hotel—that edifice stood squarely in between the pro-Bush group and the President. Given its large footprint, the hotel is not easy to get around. Any person in the pro-Bush group armed with a handgun or explosive would likely have been unable to use those weapons against the President given the large hotel in between.

By contrast, the view and access of the anti-Bush protesters at Fourth and California was not similarly

impeded. To be sure, there was also a building in between the protesters and the President; but it is a very different building. The Sterling Savings Bank building is one story, not two; and its footprint is about a third the size of the United States Hotel's. Critically, the bank building does not extend past and shield the outdoor patio the way the United States Hotel does. Behind the bank building is a parking lot that provides direct access to the patio where the President was dining. Using Street View, one can explore that parking lot and its access to the patio. One can also place oneself on the northeast corner of Fourth and California Streets, near the defunct gas station, and look toward the patio. The gas station is set back further from the sidewalk. One can stand where the anti-Bush protesters stood near the gas station, look through the parking lot behind the Sterling Savings Bank, and see the brown wooden fence surrounding the back dining patio of the Jacksonville Inn where the President was dining. Indeed, all it takes from Fourth and California is one Street View arrow click and one rotate click to be looking squarely at the brown wooden patio fence. By contrast, from Third and California, one needs about three arrow clicks just to get to the Third Street alley, which does not even afford a direct view of the patio.

Google Maps Street View thus confirms that the two groups of demonstrators were *not* similarly situated from a security perspective, which is what the Petitioner Secret Service Agents were properly concerned about. Consider in particular the most obvious and probable security threat—that a demonstrator might be armed with a concealed handgun.[4]

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[4] Oregon is a "shall-issue" concealed-carry state. *See* OR. REV. STAT. § 166.291 (version effective until 1/1/2014). This Oregon

None of the demonstrators had passed through magnetometers or been searched. Concealed handguns among the demonstrators were thus a very real concern. A shooter in the pro-Bush group had no line of sight to the outdoor patio—the United States Hotel was squarely in the way. A shooter in the anti-Bush group, by contrast, might have had a direct shot at the patio from the corner of Fourth and California. The wooden fence would not stop a bullet. And suppose that a shooter were able to break out from his or her group and run a few steps before taking a shot. A shooter from the pro-Bush group would not improve his or her vantage—the United States Hotel is just too big. But a shooter from the anti-Bush group could get a much better shot by running just a few steps toward the parking lot. The distances may have been roughly the same as the crow flies, but the two street corners are profoundly different as the bullet flies.

In defending its decision to deny qualified immunity, the Ninth Circuit majority relied upon the obvious impact of distance on communication, explaining how one does not need a tape measure or noise dosimeter (*i.e.*, a sound level meter) to appreciate how an additional block of distance can impair communication. App. 5a. While that may be true, it is equally true that one does not need any specialized training in security, weapons, or crowd dynamics to appreciate how the anti-Bush group at Fourth and California posed a substantially greater security threat to the President than the pro-Bush group at Third and California. The difference is obvious. Viewing the protest from the perspective of the Petitioner Secret Service Agents, aided by Google Maps Street View,

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state-wide "shall-issue" statute generally preempts local attempts to regulate handguns more restrictively. *See id.* §§ 166.170-.176.

makes concrete and confirms the Agents' security rationale for moving the anti-Bush protesters an additional block to Fifth Street.

II. The Ninth Circuit's qualified immunity analysis failed to consider the Petitioner Agents' neutral explanation for moving the anti-Bush protesters the additional block.

This Court held in *Iqbal* that whether a complaint's well-pled facts give rise to a "plausible inference" of unconstitutional discrimination or retaliation depends in part on whether there is an "obvious alternative explanation" that could account for the conduct in a constitutionally permissible manner. *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007). Applying qualified immunity based on an "obvious alternative explanation" can weed out meritless constitutional claims at the pleading stage, thereby vindicating qualified immunity's aim of providing *immunity from suit* and not simply a defense to liability. *Id.; Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

This new rule of pleading is especially important in evaluating qualified immunity claims stemming from situations involving public demonstrations in the presence of important officials, where both First Amendment values and legitimate security concerns are at their respective zeniths. In these situations, protesters will naturally tend to view any conduct that "disadvantages" their protest speech as politically motivated and unconstitutional. But the law enforcement officers accused of engaging in impermissible viewpoint discrimination may well be able to articulate viewpoint-neutral reasons for their conduct.

That situation arose in *Reichle v. Howards*, 132 S. Ct. 2088 (2012). There, protester Howards expressed his antipathy to the Vice President's policies (fully protected speech), but also touched the Vice President (possibly a serious crime). *Id.* at 2091. Secret Service Agent Reichle attempted to investigate Howards to determine whether he posed a threat. Howards was deliberately uncooperative, leaving Agent Reichle with no choice but to arrest Howards. *Id.* While not reflected in the Court's short opinion, the record included discovery depositions that developed Agent Reichle's rationale: Howards had just had an angry and physical encounter with the Vice President; he was being deliberately uncooperative with Reichle's efforts to investigate and clear him; and for all Reichle knew or could learn, Howards might have had a gun in a nearby car that he could retrieve. What Howards perceived as viewpoint discrimination had an obvious alternative explanation.

The record in *Reichle* also developed how Howards sought to avoid summary judgment by testifying that Agent Reichle appeared visibly angry during the encounter—a reaction that Howards ascribed to Agent Reichle's supposed displeasure over Howards' political speech. Again, there was an obvious alternative explanation: Agent Reichle was angry over Howards' refusal to cooperate, which effectively forced Reichle to arrest him (and led to Reichle being sued as a result). Although the interlocutory appeals in *Reichle v. Howards* took place at the summary judgment stage, and this Court chose to apply qualified immunity on the basis of unsettled law, the facts of *Reichle* fit well into *Iqbal*'s new rule requiring courts to consider obvious alternative explanations for alleged unconstitutional conduct. The lower courts in *Reichle* had difficulty applying the rule of *Iqbal* to overcome their

reflexive acceptance of the claimant's version of events and accompanying inferences.

The difficulty in applying the new rule of *Iqbal* in *Reichle* might be ascribed to how the rule represents a paradigm shift in procedure, and such shifts take time to settle in. Other cases show how courts are beginning to apply the new rule to spare government actors from unnecessary and burdensome litigation. *See, e.g., George v. Rehiel*, No. 11-4292, 2013 WL 6768151, at *20 (3d Cir. Dec. 24, 2013) ("The TSA Officials' suspicion was an obvious alternative explanation for their conduct, which negates any inference of retaliation.") (discussed below); *Jabary v. City of Allen*, No. 12-41054, 2013 WL 6153241, at *4 (5th Cir. Nov. 25, 2013) (unpublished) (deeming "not plausible" the plaintiff's equal-protection claim, observing that the city's decision to revoke his tobacco shop's certificate of occupancy was obviously motivated by his alleged sales of tobacco to minors, the shop's close proximity to schools, and his sales of a controversial drug, rather than his race, religion, or national origin); *Chavez v. United States*, 683 F.3d 1102, 1111 (9th Cir. 2012) (noting that an obvious alternative explanation for the border patrol's failure to keep records of stops during roving patrols, which plaintiffs claimed was evidence of a "deliberate pattern and practice, designed to conceal or obfuscate" the allegedly suspicionless stops, was that doing so "would have imposed a substantial administrative burden that interfered with accomplishment of its other law enforcement objectives"); *Air Sunshine, Inc. v. Carl*, 663 F.3d 27, 36-37 (1st Cir. 2011) (concluding that the better and more obvious explanation for the FAA's delay in issuing airplane certifications and performing inspections was not the airline owner's criticism of FAA employees, but rather the airline's failure to follow

proper procedures in seeking the certifications and inspections). *See also, e.g., Tobey v. Jones*, 706 F.3d 379, 403-04 (4th Cir. 2013) (Wilkinson, J., dissenting) (noting that eliminating the distraction that plaintiff's "nearly naked state" caused was an obvious benign explanation for a TSA agent's decision to call the police after the plaintiff, during screening, refused to get dressed after removing his shirt (and sweatpants) to display the text of the Fourth Amendment that the plaintiff had written on his chest as a form of protest against body scans).

This Court can reinforce this trend, and provide a helpful example of the *Iqbal* rule in action, by applying the "obvious alternative explanation" rule here to law enforcement officers charged with protecting individuals or public safety during a political protest. One lesson of cases like *Iqbal*, *Reichle*, and *George v. Rehiel* (the recent Arabic flashcard case, discussed below) is that politically charged situations are fraught with, and naturally prone to, misunderstandings and divergent interpretations. Prior pleading rules treated a claimant's interpretation as sacrosanct, requiring courts to deny qualified immunity and allow lawsuits against law enforcement officers to go forward based on the claimants' interpretation of events, however implausible. *Iqbal* changed this protocol. Now courts must still accept the claimant's well-pled facts as true, but they must also approach the qualified immunity analysis by considering the situation from the perspective of the defendant law enforcement officer and the obvious security concerns that more plausibly explain the officer's actions. The Ninth Circuit majority did not consider the more obvious explanations for the Agents' conduct in this case, even though the issue was thoroughly joined.

The Court should continue the development of the law started in *Twombly* and furthered in *Iqbal* for qualified immunity, by ruling here that the security concerns in protecting the President supply an "obvious alternative explanation" for the Agents' decision to relocate the anti-Bush protesters, rendering their First Amendment retaliation claim implausible.

III. The Agents may consider the content of the demonstrators' speech in evaluating security threats.

Another issue that has not been developed in detail by the parties, but bears careful consideration, is how the content of speech may be justifiably considered by law enforcement officers in protecting persons from assassination or protecting public peace and safety.

The rule that government actors must remain scrupulously neutral as to the content of speech is so well entrenched in our constitutional psyches that it can be difficult to acknowledge that sometimes law enforcement may justifiably react to even core political speech based on its content. Our deep constitutional commitment to robust and uncensored debate in public forums makes it difficult to conceive how a speaker's viewpoint could ever be legitimately considered. But from the perspective of a bodyguard like the Petitioner Agents, or any law enforcement officer concerned about maintaining public safety, there is no bright line between speech that is fully protected and speech that may require a justifiable response. Speech does not exist in a vacuum; it must be considered in context.

Secret Service agents or other law enforcement officers protecting persons or public safety must

necessarily consider the content of speech in evaluating potential threats, since the content of a person's speech can indicate whether that person poses a potential threat. Presidential assassins are usually politically motivated, and political motivations naturally manifest themselves through speech that the First Amendment often protects. "Sic semper tyrannis" (thus always to tyrants) is protected political speech, and fully consonant with mainstream American political values—the phrase appears on the State Seal of Virginia. But if a Secret Service agent hears someone shout this phrase in close proximity to the President, especially in a protest situation where the public has not been screened for weapons, the agent might justifiably stop and maybe even arrest that person because of the obscure Latin phrase's close association with Booth's assassination of Lincoln. *Cf. Watts v. United States*, 394 U.S. 705, 708 (1969) (per curiam) (the First Amendment does not protect "true threats"); *Scheuer v. Rhodes*, 416 U.S. 232, 246-47 (1974) (qualified immunity protects officials who must "act swiftly and firmly" when faced with "an atmosphere of confusion, ambiguity, and swiftly moving events").

The recent case of *Reichle v. Howards* is again instructive. There, when Vice President Cheney unexpectedly appeared at an open-air mall, a Secret Service agent overheard Howards say into his cellphone that he was going to ask the Vice President "how many kids he's killed today," in reference to his policies in Iraq. 132 S. Ct. at 2091. That phrase comes from a familiar protest chant ("Hey, hey, L.B.J. . . ."), and is thus mainstream political speech. But when a Secret Service agent hears someone say the words "kill" and "Vice President" in the same sentence, that agent may justifiably consider the content of this protected speech in his role as the Vice President's

bodyguard. As Justice Ginsburg noted in her concurring opinion, no matter the Secret Service Agents' views on the Administration's policies in Iraq, "they were duty bound to take the content of Howards' statements into account in determining whether he posed an immediate threat to the Vice President's physical security." *Id.* at 2097 (Ginsburg, J., concurring).

A recent decision by the Third Circuit offers another concrete example of how protected speech may justify a reaction by law enforcement in light of context. In *George v. Rehiel*, No. 11-4292, 2013 WL 6768151 (3d Cir. Dec. 24, 2013), a college student went through airport security at the Philadelphia International Airport in order to fly across country to start his senior year at Pomona college. The student, a Middle Eastern Studies major, was carrying "a deck of Arabic-English flashcards and a book critical of American interventionism." *Id.* at *1. The flashcards included plenty of everyday words and phrases, but also included cards with these words: bomb, terrorist, explosion, attack, battle, kill, to target, to kidnap, and to wound. *Id.* The TSA detained the student to investigate, and the detention lengthened into a few hours while the FBI was called in. *Id.* at *2. The student was released, and he caught a flight to college the next day. *Id.* at *3. In response to the student's *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) lawsuit for First Amendment retaliation, the Third Circuit recognized the protected nature of the student's speech, noting how the parties agreed that it was "beyond dispute that the First Amendment protects George's right to possess, read and study the flashcards and the book he was carrying." *Id.* at *20. But just as saying words like "bomb" or "terrorist" in a TSA line will justifiably get you pulled aside, so too

will carrying Arabic flashcards with these words. *Id.* The Third Circuit therefore affirmed dismissal based on qualified immunity.

In addition to the common tendency to misinterpret any governmental action as politically motivated, the line between protected speech and actionable speech can often be quite thin when it comes to protecting the safety of the President, or protecting public safety in general. *See, e.g., Hunter v. Bryant*, 502 U.S. 224 (1991) (per curiam) (Secret Service agents acted reasonably in making a warrantless arrest of a suspect who wrote a rambling letter warning of a plan to assassinate the President); *United States v. Bagdasarian*, 652 F.3d 1113 (9th Cir. 2011) (discussing whether internet postings threatening the President constituted a "true threat" for which the speaker could be criminally prosecuted). In such circumstances, courts properly apply qualified immunity to provide law enforcement with breathing space so they need not err on the side of self-restraint, for fear of being sued. *Hunter*, 502 U.S. at 229.

Here, the complaint lacks specifics regarding the anti-Bush demonstrators' protest speech. We do not know what the demonstrators were chanting, how they were chanting it, and whether their chosen language and delivery created any particular security concerns for the Secret Service.

But one thing can be readily inferred: the anti-Bush demonstrators came to California Street that evening because they had a bone to pick with the President, so any security issue that might emerge from the situation was more likely to come from the group of anti-Bush demonstrators. From the perspective of the degree of protection afforded their pure political speech, the anti-Bush protesters may have been

similarly situated to the pro-Bush supporters. But from the perspective of a bodyguard, the two groups were not the same. A Secret Service agent may rightfully acknowledge the obvious: a threat is more likely to emerge from a group of protesters than from a group of supporters. *See, e.g., Saucier v. Katz*, 533 U.S. 194 (2001) (holding that a law enforcement official protecting the Vice President was permitted to arrest a banner-carrying protester who emerged from a designated protest area and started walking toward the Vice President).

Of course a clever assassin might plant himself or herself in the pro-Bush group as a diversionary tactic, but bodyguards necessarily evaluate probabilities. A Secret Service agent on the ground might justifiably regard the anti-Bush protesters as the more dangerous of the two groups. And both groups of demonstrators might be justifiably regarded as more dangerous than the group of diners who were already at the Jacksonville Inn when the President arrived, because these people were close to the President by coincidence, whereas both groups of demonstrators deliberately came out to encounter the President.

The marginal difference in security threat implied by protesters' anti-Bush orientation may be slight here, but it is not inconsequential. The question before the Court is whether the Secret Service Agents had some justifiable, non-discriminatory reason to move the anti-Bush group further away from the President than the pro-Bush group. The greater likelihood of a security threat emerging from the anti-Bush group, particularly when coupled with the substantially greater physical access to the President discussed above, provides additional support for the application of qualified immunity in this case.

IV. The supposed constitutional violation of "disadvantaging" a speaker is defined at too high a level of generality.

This Court has "repeatedly told courts—and the Ninth Circuit in particular—not to define clearly established law at a high level of generality" in conducting qualified-immunity analysis. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011). *Accord Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (summarily reversing the Ninth Circuit for evaluating qualified immunity "at a high level of generality"); *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (reversing the Ninth Circuit because "whether the right was clearly established must be considered on a more specific level than recognized by the Court of Appeals"); *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (evaluating a claim at an abstract level of generality would transform "a guarantee of immunity into a rule of pleading").

Here, in the same breath that the Ninth Circuit purported to acknowledge this central rule of qualified immunity analysis, it defined the constitutional right at issue as a right of speakers not to be "disadvantaged" based on their viewpoint. App. 45a. That is a deliberately abstract definition of the constitutional right at issue. As this Court explained in *Anderson v. Creighton*, the doctrine of qualified immunity is rendered meaningless if it can be overcome by alleging a violation of "extremely abstract rights." 483 U.S. at 639. Defining a constitutional right at the appropriate level of specificity is an important and sometimes dispositive part of a qualified immunity analysis. *See Hagans v. Franklin County Sheriff's Office*, 695 F.3d 505, 508-09 (6th Cir. 2012) ("Precedent demands instead that we go down

the stairs of abstraction to a concrete, particularized description of the right. Though not too far down: just as a court can generalize too much, it can generalize too little. If it defeats the qualified-immunity analysis to define the right too broadly (as the right to be free of excessive force), it defeats the purpose of § 1983 to define the right too narrowly (as the right to be free of needless assaults by left-handed police officers during Tuesday siestas).").

It is not surprising that many cases can be cited for the abstract proposition that government actors may not "disadvantage" speakers based on their viewpoint. A proper qualified immunity analysis, however, must address what it means to "disadvantage" a protester in the current factual context, and determine whether such a particular disadvantagement was forbidden by clearly established law. Here, the Ninth Circuit held that the anti-Bush protesters' clearly established First Amendment rights were violated when the Secret Service agents moved them a block further away from the President than a group of pro-Bush supporters. But the Ninth Circuit did not offer a single viewpoint discrimination case that recognized a First Amendment violation based only on the distance permitted between speakers and their intended audience.

Perhaps if this protest had involved identical speakers on a set of abstract Cartesian coordinates, then moving only the anti-Bush speakers away from the President might support a constitutional claim. It is only in this most abstract rendering that the distance between a group of speakers and their intended audience could be viewed as so obviously implicating First Amendment concerns as to require no prior precedent. *Cf. K.H. Through Murphy v.*

Morgan, 914 F.2d 846, 851 (7th Cir. 1990) (Posner, J.) (requirement that the law be clearly established does not mean that there must be a controlling appellate decision precisely on point, because "the easiest cases don't even arise. There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances."). But the events at issue took place in the real world—in a small town, with all manner of geography and architecture to contend with, and a very real possibility of concealed weapons among the protesters.

Again, the Court's qualified immunity analysis in *Scott v. Harris* is particularly instructive on the issue of generality. The question before the Court was whether a police officer's decision to end the high-speed car chase by running the suspect off the road was prohibited by the law as established in *Tennessee v. Garner*, 471 U.S. 1 (1985), that police may not use "deadly force" to prevent a fleeing felon from escaping. The claimant in *Scott v. Harris* (who had been paralyzed in the car chase) naturally presented his claim as controlled by *Garner*: he was a fleeing felon, and the police used deadly force to stop his flight. Under this framing of the claim, *Garner* provided clearly established law that prohibited the police officer's decision to run him off the road. The Court, however, did not accept the claimant's invitation to view its prior precedent at the claimant's preferred high level of generality.

The Court held that "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'"

550 U.S. at 382. The Court instead undertook a detailed factual analysis of the situation from the perspective of the officer who had to decide whether and how to stop this particular fleeing felon. The Court contrasted the situation before it with the facts of *Garner*, where a police officer shot a slight and unarmed burglary suspect in the back of the head to prevent him from escaping rather than to protect the public. Under the facts as revealed by the videotape of the police chase, the Court determined that the police officer had acted reasonably under the circumstances to protect the public from Harris's dangerous and reckless driving, and was therefore entitled to qualified immunity. *Id.* at 383-86.

Scott v. Harris confirms that the proper level of generality is a level that takes full account of all of the relevant motivating considerations of the government actor who has been sued. *Accord al-Kidd; Brosseau.* When the Court considers the protesters' claims at a detailed enough level of specificity to take into account the Secret Service Agents' evident security concerns, the justifications for the Secret Service Agents' conduct clearly emerge, and merit qualified immunity.

CONCLUSION

For the reasons set forth above, the judgment of the Ninth Circuit Court of Appeals should be reversed, and this action dismissed based on qualified immunity.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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TIM WOOD and ROB SAVAGE,

Petitioners,

v.

MICHAEL MOSS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF PROFESSORS OF CIVIL PROCEDURE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICI CURIAE*

This brief is written on behalf of a group of law professors who teach and write in the areas of Civil Procedure and Federal Courts. *See* Appendix (listing *amici*). Although we conclude that respondents have adequately pled a claim upon which relief can be granted, our principal focus is not on the merits of this case, but on the procedural standards used to assess the legal sufficiency of a pleading. Our goal is to promote a coherent and workable system of pleadings that is consistent with the Federal Rules of Civil Procedure and with this Court's precedents interpreting those rules.[1]

SUMMARY OF ARGUMENT

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), this Court established the standards to determine whether a complaint states a claim upon which relief can be granted. That determination focuses on the elements of the claim and on the non-conclusory, factual matter

[1] Petitioners and respondents have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made any monetary contribution intended to fund the preparation or submission of this brief. Loyola Law School, Los Angeles, California, paid the cost of printing and filing this brief. No other person or entity made any monetary contribution to the preparation and submission of this brief.

alleged in that complaint. The sufficiency of a complaint must be established by reference to the alleged facts and the reasonable inferences that may be drawn therefrom. The question is whether those allegations and inferences plausibly suggest a claim upon which relief can be granted.

This case turns on what constitutes a reasonable inference. A reasonable inference is one on which reasonable minds may differ. It need not be the exclusive inference one may draw from the facts. Rather, it need only fall within the range of sensible, rational alternatives.

It is important that this Court adopt an approach to reasonable inferences that does not impose a restrictive pleading regime that is inconsistent with the principles underlying Rules 8(a)(2) and 12(b)(6) of the Federal Rules of Civil Procedure or with this Court's decisions in *Twombly* and *Iqbal*. The endorsed standard should recognize the primary role of district courts in making what is essentially a practical and commonsense judgment as to which inferences may be sufficient to support a claim. Certainly, a mechanical formula intended to instruct courts on how to identify a reasonable inference would serve neither the ends of justice nor principles of sound case-management.

ARGUMENT

Introduction. This Court granted certiorari over two questions, the first pertaining to qualified immunity,

the second to pleading. The pleading question is the only one we address in this brief. It asks whether respondents have adequately pled a claim of viewpoint discrimination in violation of the First Amendment's Free Speech Clause. This question presents a fact-specific inquiry into the application of settled doctrine. Thus, to solve it, we need only test respondents' Second Amended Complaint (SAC) against Rule 8(a)(2)'s established pleading standard, as interpreted by this Court's precedents. The essential question in this case is whether the factual material in respondents' complaint supports a reasonable inference of viewpoint discrimination.

1. As is well established, Rule 8(a)(2)'s requirement of a "short and plain statement of the claim" introduced a notice pleading standard that replaced and contrasts sharply with the previous highly technical code-pleading regime. *See Advisory Committee Report of October, 1955 on Rule 8(a)(2)*. In the words of Judge Charles Clark, one of the leading proponents of notice pleading, "[u]nder the new rules of civil procedure, there is no pleading requirement of stating 'facts sufficient to constitute a cause of action,' but only that there be 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Diguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944). Yet, as this Court pointed out in *Twombly*, while Rule 8(a)(2) sought to simplify pleading standards, it did not obviate the need to plead facts:

> While, for most types of cases, the Federal Rules eliminated the cumbersome requirement

> that a claimant "set out *in detail* the facts upon which he bases his claim," *Conley v. Gibson*, U.S. 41, 47 (1957)(emphasis added), Rule 8(a)(2) still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 n. 3 (2007). The Court in *Twombly* did not require the adoption of anything akin to a code-pleading standard. Rather, the Court endorsed a standard under which the pleader is only required to allege facts "plausibly suggesting" that a claim for relief had been stated. *Id.*, at 557.

The Court's resolution of the pleading issue in *Twombly* is instructive. The precise question there was whether the plaintiffs had adequately pled the existence of an agreement to restrain competition, an essential element of their Sherman Act claim. The plaintiffs in *Twombly* asked the Court to infer the existence of such an agreement from their allegations showing that the defendants had engaged in parallel, non-competitive conduct. But the substantive law of the Sherman Act did not permit such an inference. Under the Sherman Act, a plaintiff cannot establish the existence of an unlawful agreement solely based on parallel conduct; rather, parallel conduct can only support the inference of an unlawful agreement if the

plaintiff pleads additional facts rebutting the presumption that such parallel conduct is driven by market considerations ("plus factor"). *Id.* 550 U.S., at 553; *see also* Allan Ides, Bell Atlantic *and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604 (2007).

In *Twombly,* the complaint did not include any allegations directly supportive of this necessary plus-factor; nor did the complaint contain any factual allegations from which an inference of a plus-factor could be drawn. In short, the plaintiffs' complaint contained no factual allegation that directly or indirectly supported an essential element of their claim. The complaint was therefore insufficient. The *Twombly* Court made clear that it was not imposing a probability standard nor was it requiring proof sufficient to sustain a claim. 550 U.S., at 556. Instead, the flaw in the *Twombly* complaint was simply that it failed to allege factual matter suggestive of the existence of an unlawful agreement under the Sherman Act.

The Court revisited the question of pleading sufficiency in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). There the question centered on whether the plaintiff had adequately alleged that the defendants, a former Attorney General of the United States and the Director of the Federal Bureau of Investigation (FBI), had intentionally discriminated against him on the basis of his religion, race, and national origin. *Id.*, at 669.

The *Iqbal* Court described the framework through which to assess the sufficiency of a complaint under Rules 8(a)(2) and 12(b)(6). Under this framework, a court must first identify the elements of the plaintiff's claim under the applicable substantive law. *Id.*, at 675-677. Next, it must accept as true all factual allegations in the complaint and all reasonable inferences drawn therefrom. *Id.*, at 678. Conclusory allegations, however, are not entitled to this presumption of truth, *id.*, at 679, for they merely recite the elements of the claim without sufficient factual elaboration. *Id.*, at 678 and 681 ("formulaic recitation of the elements"). Finally, the court, ignoring any conclusory allegations, must determine whether the remaining factual allegations are suggestive of a plausible claim for relief. As to this final step, the *Iqbal* Court instructed:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully.

Id., at 678 (internal citations omitted). Thus, at the pleading stage, the question is not one of probability or proof, but a question of whether the factual matter

asserted by the plaintiff is "suggestive" of a claim for relief and sufficient to put the defendant on notice of the specific claim asserted.

In *Iqbal*, the Court identified the plaintiff's claim as being premised on a violation of the First and Fifth Amendments to the U.S. Constitution. *Id.*, at 669. The Court then pointed out that "[w]here the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose." *Id.*, at 676. After identifying the claims and the shared essential element of discriminatory purpose, the Court focused on the non-conclusory factual allegations in the complaint to see whether they were suggestive of a claim of intentional discrimination. The Court concluded that "the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." *Id.*, at 683. Hence, said the Court, plaintiff's factual allegations failed to suggest discriminatory intent.

The critical question at the pleading stage is whether the case should be allowed to proceed to discovery, after which the discovered material can be subjected to summary judgment motions and, if a

genuine issue of material fact remains, the case may proceed to trial where evidence will determine the disputed facts. After all, factual disputes over which reasonable minds may differ are not to be resolved without the benefit of discovery or trial. Hence, the demands imposed by the plausibility standard should be no stricter than necessary to determine the existence of a claim worthy of further factual exploration. If the allegations are "suggestive" of a claim, the complaint should survive a Rule 12(b)(6) motion "even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Twombly*, 550 U.S. at 556. Certainly, conflicting rational inferences should not be balanced or resolved on a Rule 12(b)(6) motion where the plaintiff's factual allegations are assumed to be true.

2. Application. In applying the *Twombly-Iqbal* framework to the present case, we must identify the elements of the claim and assess whether the non-conclusory, factual allegations are suggestive of a plausible claim upon which relief can be granted.

Here, plaintiffs "contend that Secret Service agents, Defendant-Appellants Tim Wood and Rob Savage ("agents" or "Secret Service agents"), engaged in unconstitutional viewpoint discrimination in violation of the First Amendment, by requiring the protestors to demonstrate at a distance from the President because they were protesting – rather than supporting – his policies." *Moss v. United States Secret Service*, 675 F.3d 1213, 1218-1219

(9th Cir. 2012), *rehearing en banc denied*, 711 F.3d 941 (9th Cir. 2013). "[A] claim of viewpoint discrimination in contravention of the First Amendment requires a plaintiff to show that the defendant acted with a viewpoint-discriminatory purpose." *See Pahls v. Thomas*, 718 F.3d 1210, 1230 (10th Cir. 2013).

Thus, respondents' SAC must contain sufficient non-conclusory, factual material to support a reasonable inference that petitioners acted with a viewpoint-discriminatory purpose. In the discipline of logic, an inference can be established in two ways, deductively or inductively. A deductive inference is a product of the classic syllogism and flows ineluctably from its major and minor premises. (All humans are mortal; Socrates is a human; Socrates is mortal.) If the premises are true, then the logical deduction provides absolute proof of its conclusion. An inductive inference, on the other hand, is one for which the premise – a set of facts thought to be true – makes it only probable that a particular conclusion is itself true. (Most adult humans are taller than two feet; Bob is an adult human; Bob is most likely taller than two feet.) As the Court explained in *Twombly* and *Iqbal*, notice pleading requires neither proof nor probability of truth. Thus, an inference drawn from the facts alleged in a pleading – which facts must be assumed to be true – does not need to be deductively *proven* or inductively *probable*. Rather, such an inference need only be reasonable, and reasonableness permits a range of alternative inferences, that is, inferences on which reasonable minds may differ. Thus, under Rules 8(a)(2) and 12(b)(6), an inference drawn

from the factual material in a pleading does not need to be the exclusive or even the most probable inference. Rather, it only needs to be an inference among the range of reasonable alternatives. Discovery and trial will then reveal which of these competing and factually supported inferences is, in fact, true.

In the present case, the basic story is this: there were two groups of demonstrators near the Jackson Inn where President Bush dined, a pro-Bush group and an anti-Bush group; the petitioners ordered only the anti-Bush group to move. The question is whether the SAC adequately alleges that petitioners' decision to move only the anti-Bush group was motivated by that group's political viewpoint.

There are two relevant clusters of factual allegations in the SAC from which an inference of discriminatory purpose might be drawn. The first cluster involves facts surrounding the disparate treatment of the pro-Bush and anti-Bush demonstrators. The second cluster deals with the pattern or practice of the petitioners in dealing with the demonstrators.

With reference to the disparate-treatment cluster, the following non-conclusory, factual allegations in the SAC may be considered to determine whether respondents have adequately alleged a claim of purposeful viewpoint discrimination:

- "Beginning about 5:00 PM on October 14, 2004, Plaintiffs and Plaintiffs' Class, consisting of about 200 to 300 anti-Bush demonstrators, including elderly people, families, children, and babes in arms, assembled in

Griffin Park in Jacksonville, Oregon." (SAC at ¶42).

- "At about 6:00 PM, the anti-Bush demonstrators, in accordance with the planned demonstration . . . left Griffin Park and proceeded to California Street between Third and Fourth Streets." (SAC at ¶44).
- "At that time, [the anti-Bush demonstrators] did not know that the President would decide to come to the Jacksonville Inn on California Street for dinner." (SAC at ¶45).
- "Immediately adjacent to the anti-Bush demonstrators was a similarly sized group of pro-Bush demonstrators, also chanting and exhibiting signs. The pro-Bush demonstrators began at the western curbs of Third Street and extended west along California to Fourth Street. The two groups were separated only by the 37-foot width of Third Street. Interactions between the anti-Bush demonstrators and the pro-Bush demonstrators were courteous and even jovial." (SAC at ¶46).
- "At about 7:00 PM, the pro-Bush and anti-Bush demonstrators learned that the President was coming to dine at the Jacksonville Inn on the north side of California Street between Third and Fourth Streets." (SAC at ¶47).
- "After learning of the President's dinner plan, the participants in both pro-Bush and anti-Bush demonstrations clustered more on

the north side of California Street than on the south side. . . . Both sets of demonstrators had equal access to the President during his arrival at the Jacksonville Inn and would have had equal access during his departure had the anti-Bush demonstrators not been . . . moved two blocks east as alleged below." (SAC at ¶48).

- "Shortly after 7:00 PM, just prior to the President's arrival at the patio dining area at the rear of the Jacksonville Inn, at the request of the Secret Service agent on site, a group of [state and local] police officers dressed in riot gear cleared the Third Street alley all the way to the patio dining area directly behind the Jacksonville Inn. Police also blocked Third Street, including both sidewalks, north of California Street. Riot-geared police officers cleared the California Street alley running along the east side of the Inn and were stationed at the entrance of the California Street alley to prevent any unauthorized persons from entering the alley. No demonstrators attempted to enter the California Street alley at any time after the police cleared the alley. At the intersection of Third and California Streets, the . . . police officers began barring members of both groups of demonstrators from crossing the streets, and confining them to the sidewalks on which they were standing." (SAC at ¶49).

- "The anti-Bush demonstrators along California Street did not have any access to the president or any line of sight to the dining

patio at the rear of the Jacksonville Inn. As shown on Exhibit A, the anti-Bush demonstrators were blocked by the buildings along California Street . . . and by the riot-geared police officers stationed at the entrance of the California Street alley." (SAC at ¶50).

- "President Bush and his party arrived at the back of the Jacksonville Inn at approximately 7:15 PM. . . . The patio dining area was enclosed by a 6-foot high wooden fence, blocking a view of those in the patio dining area from the sight of all those outside that area." (SAC at ¶51).

- "Also present inside the Inn and the patio dining area were dozens of guests and diners. Defendants did not screen these persons or order or force them to leave the patio. Also present, just upstairs from the patio dining area, was a group of approximately thirty persons participating in [a medical conference]. Some members of the medical group, who came downstairs to get a glance at the President, found an unguarded door leading into the patio dining area, opened that door and stood looking at the President from a distance of about 15 feet." (SAC at ¶52).

- "Fifteen minutes later at about 7:30 PM, after class members' anti-Bush chants and slogans could be heard within the patio where the President was dining, Secret Service Defendants Wood, Savage and John Doe 1 requested or directed [state and local police officers] to clear California Street of all

persons between Third and Fourth Streets – that is, the members of Plaintiff Class – and to move them to the east side of Fourth Street and subsequently to the east side of Fifth Street." (SAC at ¶53).

- "The Defendants claim that the Defendant Secret Service agents told [state and local police] that the reason for the Secret Service's request or direction was that they did not want anyone within handgun or explosive range of the President. . . ." (SAC at ¶54).

- "Had that been the true reason for the request or direction, the Defendant Secret Service agents would have requested or directed that all persons dining, staying at, or visiting the Inn who had not been screened by the Secret Service or the Police Defendants be removed from the Inn. Likewise, had that been the true reason for the request or direction, the Defendant Secret Service agents would have requested or directed that the pro-Bush demonstrators at the corner of Third and California be moved further to the west so that they would not be in range of the President as he travelled from the Inn to the Honeymoon Cottage where he was staying." (SAC at ¶55).

- "Instead, the Defendant Secret Service Agent left the pro-Bush demonstrators on the Northwest and Southwest corners of Third and California Streets . . . to cheer for President Bush as he traveled to Honeymoon Cottage, while causing the anti-Bush demonstrators

to be . . . moved two blocks east, well out of the President's view." (SAC at ¶56).

- "The Police Defendants continued forcefully to move class members from where they were demonstrating, using clubs, pepper spray bullets, and forceful shoving, east along California Street until they had all crossed Fourth Street, the Police Defendants divided the class members into two groups, encircling each group and preventing class members from leaving the area." (SAC at ¶61).

- "During the entire time these actions were being taken against Plaintiffs and Plaintiff Class members, the Defendants did not take any action to move the pro-Bush demonstrators or to move the unscreened diners, hotel guests, and other visitors, including the assembled medical group, who were inside the Inn." (SAC at ¶62).

Under *Twombly* and *Iqbal*, the facts alleged by the plaintiffs must be taken as true. *Twombly*, 550 U.S., at 556; *Iqbal*, 556 U.S., at 666. Furthermore, as the *Iqbal* Court explained, "[a] claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S., at 678; *see also Twombly*, 550 U.S., at 556. Thus, according to the above allegations, the anti-Bush demonstrators were peaceful; they were not aware that President Bush would be dining at the Jacksonville Inn until just before his arrival; the anti-Bush and pro-Bush

demonstrators had equal access to President Bush at his arrival at the Inn, but unequal access on his departure; the guests at the hotel, who were not screened, had more direct access to President Bush than the anti-Bush demonstrators; once President Bush arrived at the Jacksonville Inn, the perimeter surrounding the Inn was completely secured by riot-geared police; after that security perimeter was established, the anti-Bush demonstrators had no access to the President or any line of sight to the area where he was dining; only when the chants of the anti-Bush demonstrators could be heard in the patio dining area, did the Secret Service order the police to move the anti-Bush demonstrators to the eastern side of Fourth Street, and subsequently to the eastern side of Fifth Street, where their chants were clearly less audible and where they were clearly less visible, and where they were divided into two groups and surrounded by police; the Secret Service took no similar action with respect to the pro-Bush demonstrators or the hotel guests; the Secret Service allowed the pro-Bush demonstrators to remain at the corner of Third and California Streets, where they were able to cheer President Bush's motorcade as it left the hotel.

These allegations, taken together, support the reasonable inference that the Secret Service agents had no legitimate reason to expect the anti-Bush demonstrators to carry handguns or explosives, especially considering that the anti-Bush demonstrators had no advance knowledge that the President would be dining at the Jacksonville Inn. These allegations

also support the reasonable inference that the anti-Bush demonstrators posed no more of a threat to the President than the pro-Bush demonstrators and the hotel guests. They further show that the similarly situated demonstrators were treated differently: the anti-Bush demonstrators were moved to an area where they were less able to communicate their viewpoint to the President and his entourage. The pro-Bush demonstrators were allowed to remain in closer proximity to the President, both while he was dining and on his departure. A combination of the fact that the anti-Bush demonstrators were moved to a place where they were significantly less able to communicate their viewpoint than were the pro-Bush demonstrators, with the fact that the anti-Bush demonstrators posed no security threat to the President, plausibly suggests that the motive for moving the anti-Bush demonstrators was to shield the President from the anti-Bush message.

The inference of viewpoint discrimination is further supported by the pattern-or-practice cluster of allegations in ¶¶68, 78, and 82 of the SAC:

- "This action by the Secret Service Defendants did not comport with normal, lawful Secret Service security measures during Presidential public appearances or visits to hotels, restaurants, or other publicly accessible buildings, absent threats, reports or other special circumstances suggesting the need for unusual security measures. Specifically:

  (a) There had been no reports, threats, or other information suggesting a potential

attempt to harm the President, or any other special circumstances suggesting the need for unusual security measures.

(b) It is not the general practice of the Secret Service, in the absence of special circumstances to establish a security zone extending an entire city or town block around hotels, restaurants, or other buildings the President may be visiting in the United States.

(c) . . . .

(d) On information and belief, the criterion of keeping people out of handgun range of the President was made up for this particular occasion, having no precedent in any prior security zones or Presidential appearances, in the absence of special circumstances.

(e) On information and belief, the criterion of keeping people out of explosive range of the President was made up for this particular occasion, having no precedent in any prior security zones or Presidential appearances, in the absence of special circumstances." (SAC at ¶78).

- "This policy [of isolating anti-Bush demonstrators] was set out in some detail in the official 'Presidential Advance Manual,' dated October 2002 [attached to the SAC as Exhibit B], instructing the White House Advance Team on how to keep protesters out of the President's vicinity and sight. . . . Viewpoint

discrimination by the Secret Service in connection with President Bush was the official policy of the White House. [*See* SAC, Exhibit B, p. 9 ("There are several ways the advance person can prepare a site to minimize demonstration. First, as always, work with the Secret Service and have them ask the local police department to designate a protest area where demonstrators can be placed, preferably not in view of the event site or motorcade route.")][2] The unredacted excerpts [of the Manual] include discussions about how to deal with protesters, how to disrupt protests, and how to insure that protesters are kept out of sight or hearing of the President and the media. . . ." (SAC at ¶68).

- "According to published reports, the Secret Service has engaged in these kinds of actions against anti-government expressive activity on numerous other occasions. . . ." (SAC at ¶82). In this paragraph, respondents describe twelve incidents taking place between 2001 and 2004, where the Secret Service subjected anti-Bush demonstrators to viewpoint discrimination.

Again, this second cluster of factual allegations in the SAC must be taken as true, including all

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[2] As the Ninth Circuit noted, "It is clear from the context that the manual is referring only to demonstrators opposed to the President." Moss v. United States Secret Service, 675 F.3d 1213, 1227 n. 4 (9th Cir. 2012), *rehearing en banc denied*, 711 F.3d 941 (9th Cir. 2013).

reasonable inferences drawn therefrom. These allegations show that the measures adopted by the Secret Service in this case were inconsistent with the standard operating procedures of the Secret Service because, as alleged, there were no special circumstances suggesting the need for unusual measures. These allegations also describe an official White House policy intended to isolate the President and the media from anti-Bush demonstrators. They further show that the White House's stated goal was to coordinate with the Secret Service to promote these ends. In addition, the pattern of viewpoint discrimination engaged in by the Secret Service, as alleged in ¶82 of the SAC, suggests that the White House succeeded in this goal.

Taken together, this cluster of allegations strongly supports the inference that, in relocating the anti-Bush demonstrators to a location where they would not have an opportunity to communicate their views to President Bush, and in the absence of any circumstances suggesting a need for unusual security measures, the Secret Service agents in this case acted consistent with the Bush administration policy and with the intent to discriminate against the anti-Bush demonstrators because of their viewpoint.

3. Distinguishing this case from *Twombly*. This case is different from *Twombly*, where the complaint failed to allege any facts that either directly or by inference supported an essential element of the plaintiff's anti-trust claim. This is not such a case. The question here is whether a reasonable inference of

viewpoint discrimination may be drawn from the array of factual allegations described above. In other words, this is not an "absence-of-factual-material" case. Instead, this is a "reasonable-inference" case, and the question presented to the Court pertains only to the range of acceptable inferences that may be drawn from these allegations. We think that the viewpoint discrimination inferences that may be drawn from plaintiffs' allegations fall well within that range of acceptability.

4. Distinguishing this case from *Iqbal*. In *Iqbal*, once the Court excised the conclusory allegations of intent, the remaining factual allegations did not, according to the Court, support a plausible inference of discriminatory intent. *See Iqbal*, 556 U.S., at 680-681 (conclusory allegations of intent excised); *id.*, at 682-683 (absence of factual material supportive of intent element noted). The factual allegations may have been "consistent" with intent to discriminate, for they showed disparate impact, but they were not suggestive of such intent. *Id.* at 681. This case is different. The sufficiency of the complaint here in no way depends on conclusory allegations. In fact, petitioners could identify only a single conclusory allegation in the respondents' complaint. *See* Brief for Petitioners, at 40. Nor is respondents' complaint bereft of factual material from which the necessary inferences of viewpoint discrimination may be drawn. The complaint here does more than merely allege disparate treatment. Instead, it provides a factual basis from which to infer an impermissible motive.

Hence, this case is not about conclusory allegations or about factual allegations that are merely consistent with liability. It is about the range of rational inferences that may be drawn from a particular set of facts and whether, at the pleading stage, a court should restrict that range to a narrow, subset of reasonable options.

5. Final considerations. The Court in *Twombly* and *Iqbal* articulated standards to measure the plausibility of a complaint. Those standards require that a court identify the elements of the claim and assess whether the non-conclusory, factual allegations, either directly or by inference, plausibly suggests the existence of a claim for relief. The pleading question presented here is a narrow one that focuses solely on what constitutes a reasonable inference. The question is one that can be answered on the basis of the facts presented and does not call for the creation of a mechanical test to drive the analysis. No rigid test needs to be invented in order to determine whether an inference is reasonable. Any such test would impermissibly constrain the discretion and judgment of the district courts. The Court should recognize that because the question of whether an inference is reasonable is one on which reasonable minds may differ, conflicting interpretations of the allegations should be resolved through discovery, summary judgment or trial, rather than through adoption of a narrow doctrinal test that will serve only to complicate litigation and consume the scarce resources of federal appellate courts.

This case has been pending in the federal judicial system for over seven years, stuck on a pleading issue. The Ninth Circuit found the first amended complaint inadequate because its allegations did not support a plausible inference of viewpoint discrimination. *Moss v. United States Secret Service*, 572 F.3d 962, 971-972 (9th Cir. 2009) (*Moss I*). On remand, the district court found that the SAC, which had been augmented by additional details and factual allegations, satisfied the plausibility pleading standard. The Ninth Circuit reviewed that decision in a lengthy and detailed opinion and unanimously affirmed. *Moss v. United States Secret Service*, 675 F.3d 1213 (9th Cir. 2012), *rehearing en banc denied*, 711 F.3d 941 (9th Cir. 2013) (*Moss II*). Two presumably reasonable judicial bodies, a United States District Court and a Circuit Court of Appeals, have concluded that the allegations in the SAC are sufficient to pass the Rules 8(a)(2) and 12(b)(6) test.

If this Court were to take the step of requiring further details and greater precision at the pleading stage, it would in effect return federal pleading from a notice-pleading model back to a pre-1938 code pleading system where the test would be one of probability and proof rather than of facial plausibility. This is a step the Court should not take.

CONCLUSION

In our view, this Court should affirm the decision of the Ninth Circuit with respect to the pleading adequacy of respondents' complaint. More generally, this Court should make it clear that federal pleading standards under Rule 8(a)(2) require a court to accept as true all factual allegations in a plaintiff's complaint, including all reasonable inferences that may be drawn therefrom. The resolution of potentially competing inferences should be left to discovery, summary judgment and trial.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

TIM WOOD AND ROB SAVAGE,

Petitioners,

v.

MICHAEL MOSS, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR PUBLIC JUSTICE, P.C. AS *AMICUS CURIAE* SUPPORTING NEITHER PARTY

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Bell Atlantic v. Twombly, 550 U.S. 544 (2007) ..... *passim*

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Brown v. Board of Education, 347 U.S. 483 (1954) 7, 9

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Crawford-El v. Britton, 523 U.S. 574 (1998) 4

Fabian v. Fulmer Helmets, Inc., 628 F.3d 278 (6th Cir. 2010) 16

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Indiana State Dist. Council of Laborers & HOD Carriers Pension & Welfare Fund v. Omnicare, Inc.,
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In re Travel Agent Comm'n Antitrust Litig.,
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Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit,
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Luevano v. Wal-Mart Stores, Inc.,
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Phillips v. Bell,
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Sepúlveda-Villarini v. Department of Educ. of P.R., 628 F.3d 25 (1st Cir. 2010) 16

Starr v. Baca,
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Swanson v. Citibank, N.A.,
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Swierkiewicz v. Sorema N.A.,
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Tellabs, Inc. v. Makor Issues & Rights,
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Fed. R. Civ. P. 9(b) 13

Fed. R. Civ. P. 12 ..... 2, 4

Fed. R. Civ. P. 12(b)(6)..... 3, 4, 20

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Other Authorities

Burbank, Stephen B., *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 AKRON L. REV. 1189 (2010)..... 6

Choi, Stephen J., *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598, 600 (2007) 15

EEOC's Opp'n to Def.'s Mot. to Dismiss, *EEOC v. Alia Corp.*, 842 F. Supp. 2d 1243 (E.D. Cal. 2012) (No. 1:11-CV-01549), 2011 WL 10631649..... 21

EEOC's Resp. in Opp'n to Defs.' Mot. to Dismiss First Am. Compl., *EEOC v. BassPro Outdoor World, LLC*, 884 F. Supp. 2d 499 (S.D. Tex. 2012) (No. 4:11-CV-03425), 2012 WL 1506103..... 23

EEOC's Mem. in Opp'n to Defs.' Mot. to Dismiss, *EEOC v. Burlington Northern Santa Fe R.R.*, No. 2:12-cv-02634, 2013 WL 1397130 (D. Kan. Apr. 5, 2013)..... 20, 21, 22

EEOC's Opp'n to Defs.' Mot. to Dismiss, *EEOC v. Chapman Univ.*, No. 3:11-cv-04845, 2012 WL 1831523 (N.D. Cal. May 8, 2012)..... 20, 22

EEOC's Opp'n to Def.'s Mot. to Dismiss, *EEOC v. Fair Oaks Dairy Farms, L.L.C.*, No. 2:11-cv-00265, 2012 WL 3096695 (N.D. Ind. July 27, 2012)..... 21

EEOC's Opp'n to Def.'s Mot. to Dismiss Compl., *EEOC v. Global Horizons, Inc*, 904 F. Supp. 2d 1074 (D. Hawai'i 2012) (No. 11-cv-257), 2012 WL 10007946..... 21

EEOC's Resp. in Opp'n to Def.'s Mot. to Dismiss, *EEOC v. Hobson Air Conditioning, Inc.*, No. 3:10-CV-00818, 2010 WL 3835553 (N.D. Tex. Sept. 28, 2010)..... 20, 21

EEOC's Resp. in Opp'n to Def.'s Mot. to Dismiss, *EEOC v. PBM Graphics, Inc.*, 877 F. Supp. 2d 334 (M.D.N.C. 2012) (No. 1:11-CV-805), 2012 WL 10027993..... 23

EEOC's Resp. in Opp'n to Def.'s Mot. to Dismiss, *EEOC v. Scrub, Inc.*, No. 1:09-cv-4228, 2009 WL 3458530 (N.D. Ill. Oct. 26, 2009), 2009 WL 4402605..... 21

EEOC's Resp. Br. to Def.'s Mot. to Dismiss, *EEOC v. Wells Fargo Fin. Mich., Inc.*, No. 2:10-CV-13517, 2011 WL 1690037 (E.D. Mich. May 4, 2011)..... 20, 22

Hershkoff, Helen & Miller, Arthur R., *Celebrating Jack H. Friedenthal: The Views of Two Co-Authors*, 78 GEO. WASH. L. REV. 9 (2009)..... 6

Klein, Kenneth S., Ashcroft v. Iqbal *Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261 (2009) 17

Klein, Kenneth S., *Is* Ashcroft v. Iqbal *the Death (Finally) of the "Historical Test" for Interpreting the Seventh Amendment?*, 88 NEB. L. REV. 467 (2010)..... 7, 17

Kochan, Donald J., *While Effusive, "Conclusory" Is Still Quite Elusive: The Story of a Word,* Iqbal, *and a Perplexing Lexical Inquiry of Supreme Importance*, 73 U. PITT. L. REV. 215 (2011) 7

Miller, Arthur R., *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010) 6, 13

Rachlinski, Jeffrey J., *Processing Pleadings and the Psychology of Prejudgment*, 60 DEPAUL L. REV. 413, 414 (2011) 15

Reinert, Alexander A., *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011) 15

Searle Civil Justice Institute, *Measuring The Effects of a Heightened Pleading Standard Under* Twombly *and* Iqbal (Oct. 2013) 15

Thomas, Suja A., *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008) 7

United States' Resp. to Burns Defs.' Mot. to Dismiss, *United States v. Black Hills Tree Farm*, No. 5:09-cv-05049, 2011 WL 1044376 (D.S.D. Mar. 17, 2011), 2010 WL 5807830 21

Wasserman, Howard M., *The Roberts Court and the Civil Procedure Revival*, 31 REV. LIT. 313 (2012) 6

INTEREST OF *AMICUS CURIAE*

Public Justice is a national public interest law firm dedicated to pursuing justice for victims of corporate and government wrongdoing. Through involvement in precedent-setting and socially significant litigation, Public Justice seeks to ensure that courthouse doors remain open to all injured plaintiffs with meritorious claims. As part of its access-to-justice work, Public Justice created an *Iqbal* Project in 2009 to, among other things, track developments in the law regarding pleading, educate practitioners about proper application of the Rule 8 pleading standard, and provide strategic assistance to counsel facing motions to dismiss. Public Justice has also itself represented clients facing dismissal motions under the plausibility pleading standard and has appeared as *amicus curiae* in numerous cases addressing disputes about sufficient pleading.[1]

SUMMARY OF ARGUMENT

Amicus curiae Public Justice submits this brief in support of neither party and confines argument to issues that bear on the second question presented; namely whether respondents have adequately alleged that petitioners discriminated on the basis of viewpoint in violation of the First Amendment.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission. Petitioners and respondents consented to the filing of this brief.

In seeking reversal on the second question, petitioners implicitly ask this Court to apply a heightened pleading standard that finds no home in Federal Rules of Civil Procedure 8 or 12, nor in this Court's decisions in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Petitioners' framework for resolving pleading disputes is fundamentally flawed for two reasons: (1) contrary to this Court's controlling case law, petitioners imply that a claim should be deemed "implausible," and hence subject to dismissal, whenever a defendant offers an alternative lawful explanation for its alleged conduct that the deciding judge views as at all more likely to be true than the pleader's explanation;[2] and (2) petitioners disregard well-established pleading presumptions by asking this Court to draw factual inferences against respondents at the pleading stage and to look beyond the four corners of the complaint in order to accept factual assertions made by petitioners in their briefs. However the Court ultimately resolves the second question presented, petitioners' analytical framework should be rejected in favor of one that accords with longstanding pleading jurisprudence.

Specifically, a claim may not be dismissed simply because other lawful explanations for the complained-of behavior seem more likely to be true. Dismissal is proper only if an alternative explanation is "obvious" and so much more likely to be true than the plaintiff's theory that it renders the latter

---

[2] Respondents' Brief in Opposition does not address this aspect of petitioners' argument, making it unclear whether the parties will fully and adequately brief the issue.

implausible. Moreover, and as reaffirmed by *Twombly* and *Iqbal*, courts assessing plausibility still must draw all reasonable inferences in favor of the nonmoving party at the pleading stage, and courts must be careful not to stray beyond the four corners of the complaint to find alternative lawful explanations for the complained-of conduct alleged in the pleadings.

Thus, plausibility pleading permits dismissal on the basis of an alternative lawful explanation only if the alternative explanation appears on the face of the pleadings and is so much more likely to be true than the pleader's theory of relief that it makes that theory implausible, even when reasonable inferences are drawn in the pleader's favor. *Amicus curiae* expresses no view as to whether that standard is satisfied here.

ARGUMENT

I. The Emergence of Plausibility Pleading

Iqbal and *Twombly* introduced a change in federal pleading standards that had remained essentially static for five decades, since this Court's decision in *Conley v. Gibson*, 355 U.S. 41 (1957). Under *Conley*'s regime, complaints satisfied Rule 8(a)(2) so long as they provided notice to the defendant of the nature of suit, 355 U.S. at 47-48, and a motion to dismiss pursuant to Rule 12(b)(6) would not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Id.* at 45-46. Rule 12(b)(6) was to be invoked in those rare cases in which no viable legal theory supported a plaintiff's claim.

Notice pleading remained the standard for the fifty years between *Conley* and *Twombly*. Because lower courts sporadically experimented with heightened pleading requirements for certain categories of cases, this Court occasionally found it necessary to issue reminders that the pleading rules could not be changed outside the rulemaking or legislative process. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-13 (2002) (explaining that discovery and summary judgment, not heightened pleading requirements, are the proper means for disposal of unmeritorious suits); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (stating that a heightened pleading standard for § 1983 claims against municipalities is "impossible to square . . . with the liberal system of 'notice pleading' set up by the Federal Rules"); *see also Crawford-El v. Britton*, 523 U.S. 574, 595 (1998) ("[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.").

Twombly, a complex anti-trust case, was the first indication of change, in two ways. First, the Court "retired" the language from *Conley* that tested a Rule 12(b)(6) motion by whether "the plaintiff can prove no set of facts" consistent with the defendant's liability. 550 U.S. at 561-63 (reviewing criticisms of *Conley* and concluding that expansive language of the case "has been questioned, criticized, and explained away long enough"). Second, in its place *Twombly* substituted a "plausibility" inquiry, *id.* at 556-57, a term that was new to Rule 12 adjudications. Two years later, *Iqbal* made clear

that plausibility pleading applied in all civil cases, not just to antitrust claims or cases in which the costs of discovery were likely to be high and settlement-coercing. 556 U.S at 684.

Iqbal also articulated a two-step process for evaluating the sufficiency of a complaint. First, courts must review each allegation in a complaint and exclude from consideration those allegations that are stated in a "conclusory" fashion. *Id.* at 680-81. Second, courts must conduct a plausibility analysis that assesses the fit between the non-conclusory facts alleged and the relief claimed. *Id.* at 681. The judge may assess plausibility by calling on his or her "judicial experience and common sense," in some cases relying on assessments of the existence of other lawful explanations for the conduct alleged in the complaint. *Id.* at 679, 681-82

It is an understatement to say that the introduction of plausibility pleading has been controversial. Lower courts have expressed confusion and even consternation at this Court's formulation, in part because it offers little guidance as to how to resolve potential tension between *Iqbal* and *Twombly* on one hand, and prior decisions applying notice pleading standards on the other. *See, e.g.*, *Horras v. American Capital Strategies, Ltd.*, 729 F.3d 798, 807 (8th Cir. 2013) ("*Iqbal* says that *Twombly* applies to all civil actions, but *Swierkiewicz* . . . , reaffirmed by *Twombly*, provides that the simplified notice pleading standard of Rule 8(a) likewise applies to all civil actions."); *Luevano v. Wal-Mart Stores, Inc.*, 722 F.3d 1014, 1028 (7th Cir. 2013) (referring to "unresolved tension" in pleading cases); *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir.

2011), *cert. denied*, 128 S. Ct. 2101 (2012) ("To the extent that we perceive a difference in the application of Rule 8(a) in the two groups of cases, it is difficult to know in cases that come before us whether we should apply the more lenient or the more demanding standard."); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 319 n.17 (3d Cir. 2010) (noting disagreement within Third Circuit regarding how to interpret *Swierkiewicz* in light of *Iqbal*); *Swanson v. Citibank, N.A.*, 614 F.3d 400, 403 (7th Cir. 2010) (courts are "still struggling" with how to apply plausibility pleading); *Ruston v. Town Bd. for Town of Skaneateles*, 610 F.3d 55, 59 (2d Cir. 2010) (noting that *Iqbal* had created tension with prior circuit cases involving pleading of equal protection claims).

The cases have also earned a fair share of academic attention. Many have criticized *Iqbal* and *Twombly* for potentially altering the meaning of the Federal Rules outside of the traditional procedures contemplated by the Rules Enabling Act. *See, e.g.*, Stephen B. Burbank, *Summary Judgment, Pleading, and the Future of Transsubstantive Procedure*, 43 AKRON L. REV. 1189, 1190 (2010); Helen Hershkoff & Arthur R. Miller, *Celebrating Jack H. Friedenthal: The Views of Two Co-Authors*, 78 GEO. WASH. L. REV. 9, 28-29 (2009); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 84-89 (2010); Howard M. Wasserman, *The Roberts Court and the Civil Procedure Revival*, 31 REV. LIT. 313, 334 (2012) (noting that *Twombly* "short-circuited a preliminary discussion of notice pleading by the Advisory Committee"). Others have lamented the vague and ill-defined standard for its variance with

history and its difficulty of application. *See generally* Donald J. Kochan, *While Effusive, "Conclusory" Is Still Quite Elusive: The Story of a Word,* Iqbal, *and a Perplexing Lexical Inquiry of Supreme Importance*, 73 U. PITT. L. REV. 215 (2011) (discussing history of use of word "conclusory"). And some commentators have argued that plausibility pleading crosses a constitutional line because it asks courts to engage in fact-finding at the pleading stage. *See* Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008); Kenneth Klein, *Is* Ashcroft v. Iqbal *the Death (Finally) of the "Historical Test" for Interpreting the Seventh Amendment?*, 88 NEB. L. REV. 467, 471-72 (2010).

Because of the controversy and confusion surrounding application of plausibility pleading, *amicus curiae* respectfully urges the Court, if it reaches petitioners' second question, to clarify the applicable pleading standard in a way that minimizes disruption with prior precedent, maintains consistency with *Twombly* and *Iqbal*, and secures this Court's institutional legitimacy.

Substantial risks stem from ignoring these concerns and applying plausibility pleading too broadly. One appeals court judge recently engaged in the "thought experiment" of subjecting the allegations of injury made by the plaintiffs in *Brown v. Board of Education*, 347 U.S. 483 (1954), to an "aggressive[]" plausibility analysis. *McCauley v. City of Chicago*, 671 F.3d 611, 626-627 (7th Cir. 2011) (Hamilton, J., dissenting in part). He began with the following critical allegation from the plaintiffs' complaint in *Brown*:

> The educational opportunities provided by defendants for infant plaintiffs in the separate all-Negro schools are inferior to those provided for white school children similarly situated in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. The respects in which these opportunities are inferior include the physical facilities, curricula, teaching, resources, student personnel services, access and all other educational factors, tangible and intangible, offered to school children in Topeka. Apart from all other factors, the racial segregation herein practiced in and of itself constitutes an inferiority in educational opportunity offered to Negroes, when compared to educational opportunity offered to whites.

Id. at 626-27 (quoting Amendment to Paragraph Eight of the Am. Compl., *Brown v. Board of Education*, 98 F. Supp. 797 (D. Kan. 1951), available at http://www.clearinghouse.net/detail.php?id=5479 (last visited January 13, 2014)). As Judge Hamilton suggests, a strong argument could be made that the first and third sentences are bare legal conclusions that should be disregarded under *Iqbal*. *Id.* at 627. This leaves the middle sentence, which contains some facts but under a broad reading of *Iqbal*, not enough because there is no detail as to "how the listed items are inferior." *Id.* Moreover, even if the inferiority is sufficiently stated under *Iqbal*, there might exist "obvious alternative explanations" for the inferiority that would make the claim that the inferiority is caused by segregation implausible. *Id.* ("Disparity in outcome is just as consistent with the

natural effects of lower socio-economic status as it is with pernicious effects of racial segregation. Or so the post-*Iqbal* argument might go."). It should go without saying that this Court can, and should, articulate a pleading standard that minimizes the risk that a case like *Brown* will be dismissed prior to discovery and a merits determination.

II. The Proper Framework for Plausibility Pleading

Petitioners' arguments regarding the second question presented raise two related and important questions about the application of plausibility pleading: first, when is an alternative lawful explanation for the conduct alleged in the complaint sufficiently strong to render the plaintiff's theory implausible and to support dismissal; and second, in conducting plausibility analysis, may a court depart from the longstanding rules that a court should draw all inferences in favor of the pleader and is confined to the four corners of the complaint when it resolves a motion to dismiss for failure to state a claim.

Petitioners' approach to the first question is not a model of clarity. In different parts of their argument, they suggest that the alternative explanation must be either "considerably more likely," Pet. Br. at 18, "far more likely," Pet. Br. at 43 (internal quotation marks omitted), "obvious," Pet. Br. at 21, 41, or simply "more likely," Pet. Br. at 40, 41, 42, 43 (internal quotation marks omitted). *Amicus curiae*'s focus is on petitioners' suggestion that a pleading must be dismissed as implausible when it is susceptible to lawful explanations that are at all "more likely" than the pleader's explanation.

With regard to the second question, in characterizing respondents' complaint, petitioners often fail to acknowledge reasonable inferences that favor respondents and flow from factual allegations contained therein. Pet. Br. at 43-49. Petitioners instead ask this court to go beyond the four corners of the complaint and draw inferences against the plausibility of respondents' claims.

For the reasons detailed below, both of these approaches taken by petitioners must be rejected. *Amicus curiae* takes no position, however, on the result that should be reached in this case when a proper plausibility analysis is applied.

A. Pleading Is Not Rendered Implausible by the Existence of Alternative Explanations that Are More Plausible Than the Pleader's Theory.

Iqbal and *Twombly* suggested, for the first time, that assessing the sufficiency of a pleading may sometimes involve comparing the likelihood of the pleader's theory of relief with alternative explanations that might explain the pleader's factual allegations. In *Twombly*, for instance, the plaintiffs' theory was that an unlawful agreement explained the lack of competition between the defendants. 550 U.S. at 550-51. This Court held that the lack of competition alleged by the plaintiffs was more "obvious[ly]" explained by other lawful behavior by the defendants. *Id.* at 567. In *Iqbal*, the plaintiffs claimed that they were treated as terrorists and held in restrictive conditions of confinement because of unlawful discrimination. 556 U.S. at 669. This Court found that there was a "more obvious" alternative explanation for the plaintiffs' treatment:

they were the target of legitimate law enforcement investigation focused on discovering the perpetrators of the September 11 attacks. *Id.* at 682.

Because this Court did not explain how courts should go about comparing the plausibility of the pleader's theory with alternative explanations, however, lower courts have been mired in confusion. Some, following *Twombly* and *Iqbal*'s lead, have held that in order for a defendant's alternative explanation to support dismissal, that explanation must be obvious and so much more likely to be true that it renders the plaintiff's theory of relief "implausible." *See, e.g.*, *Gonzalez v. Kay*, 577 F.3d 600 (5th Cir. 2009) (plaintiff can state a claim where "reasonable minds can differ" about whether particular conduct violates federal statute regulating debt collection); *Arkansas PERS v. GT Solar Int'l, Inc.*, No. 08-cv-312-JL, 2009 WL 3255225 (D.N.H. Oct. 7, 2009) (defendants' alternative explanation does not render plaintiff's complaint implausible because defendant's explanation is not "obvious"); *Chao v. Ballista*, 630 F. Supp. 2d 170 (D. Mass. 2009) (defendant's explanation has to be "so overwhelming, that the claims no longer appear plausible"). Some, by contrast, have held that dismissal is appropriate whenever a defendant's explanation is more likely than the plaintiff's, even if, unlike in *Twombly* and *Iqbal*, that explanation is not obvious and significantly more likely to be true than the plaintiff's theory. *See, e.g.*, *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896 (6th Cir. 2009) (where defendants' explanation is "just as likely" as plaintiffs' explanation, plaintiffs' claim is implausible); *Phillips v. Bell*, 365 F. App'x 133, 141 (10th Cir. 2010) (finding complaint implausible

because "more plausible" reasons exist for alleged conduct); *Blanchard v. Yates*, No. CV 1-06-1841-NVW, 2009 WL 2460761, at *3 (E.D. Cal. July 27, 2009) (dismissing Eighth Amendment deliberate indifference claim because court found it "more likely" that a prison warden relied on the advice of competent professionals and was not deliberately indifferent). Finally, some courts have simply ignored the question, furthering the confusion.

This aspect of plausibility pleading – the comparison of the pleader's theory of relief with alternative lawful explanations – is particularly difficult to apply at the motion to dismiss stage, when no factual development has taken place. The failure to apply the doctrine with care and caution could lead a court to run afoul of many basic principles of pleading doctrine. For instance, if a court were simply to ask whether it found the pleader's explanation to be more or less believable than competing explanations, it would directly violate *Iqbal*, which prohibited courts from requiring that a plaintiff prove his case at the pleading stage. 556 U.S. at 678 (plausibility is not a "probability requirement") (internal quotation marks omitted). Moreover, any attempt to assess the likelihood of one theory or another inevitably runs the risk of a court making findings of fact, an outcome that would not even be permissible at the summary judgment stage. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.").

Petitioners' argument, in particular, raises red flags to the extent it implies that a claim becomes implausible simply because an alternative explanation appears "more" likely. The proper analysis, which does not accord with that implication, is found by focusing on the relationship among the three levels of pleading in existence at the federal level: Rule 8, which is the most liberal; Rule 9(b), which requires heightened pleading for fraud and mistake (but not for other states of mind) and is *slightly elevated* compared to Rule 8; and the pleading required by statutes like the Private Securities Litigation Reform Act (PSLRA) of 1995, 109 Stat. 737 which has been described as *"super heightened"* pleading. *E.g.*, *Indiana State Dist. Council of Laborers & HOD Carriers Pension &Welfare Fund v. Omnicare, Inc.*, 719 F.3d 498, 510-11 (6th Cir. 2013) (emphasis added) (citing Arthur Miller, *From* Conley *to* Twombly *to* Iqbal: *A Double Play on the Federal Rules of Civil Procedure,* 60 DUKE L.J. 1, 11 (2010)).

The same Term that the Supreme Court decided *Twombly*, it also announced *Tellabs, Inc. v. Makor Issues & Rights*, 551 U.S. 308 (2007), a case interpreting the pleading standard for the PSLRA. Specifically, the Court in *Tellabs* defined "plausibility" for the purpose of the PSLRA as equipoise: that is, if the plaintiff's theory of relief was "at least as compelling" as the alternative explanations, the complaint would survive a motion to dismiss under the PSLRA. *Id.* at 314. Accepting the common wisdom that the PSLRA sets up a super-heightened pleading standard (higher than the particularity required for fraud allegations under Rule 9(b)), it follows that the plausibility test for

Rule 8 cannot also be equipoise—it cannot require that the plaintiff's theory be "at least as compelling" as the defendant's explanation. Put another way, it must be possible for a claim to survive under Rule 8 even in some circumstances when the defendant's explanation strikes the deciding judge as to some extent more likely to be true at the pleading stage.

Indeed, it would be incoherent to interpret plausibility any other way. Requiring that a plaintiff's theory be as or more likely than alternatives would lead to the conclusion that Rule 8's pleading standard is at least as demanding, if not more demanding, than the PSLRA. *West Virginia Inv. Management Bd. v. Doral Financial Corp.*, 344 F. App'x (2d Cir. 2009). It also would disregard both *Twombly* and *Iqbal* which made clear that Rule 8 does not establish a probability requirement. *See, e.g., Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 597 (8th Cir. 2009) ("Requiring a plaintiff to rule out every possible lawful explanation for the conduct he challenges would invert the principle that the complaint is construed most favorably to the nonmoving party and would impose the sort of 'probability requirement' at the pleading stage which *Iqbal* and *Twombly* explicitly reject.") (internal quotation marks and citations omitted).

Petitioners' suggestion is not only doctrinally incoherent, but also practically and logically flawed. In the instant case, one could imagine multiple conceivable explanations for why petitioners evicted respondents from their initial demonstration site – viewpoint discrimination, desire to protect the President, or some other innocent explanation. A court is simply not equipped at the pleading stage to

evaluate with precision the likelihood that each explanation is consistent with reality, so as to determine whether the respondents' theory is "more likely" than the others. As a practical matter, this is an exercise that is bound to result in significant error.[3]

Additionally, even assuming that a court could accurately assess likelihoods at the pleading stage, it hardly follows as a logical matter that a claim is implausible simply because a court determines that other explanations are 51% likely to be true while the plaintiff's claim is only 49% likely to be correct. As many courts have recognized after *Twombly* and

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[3] Indeed, all available empirical data suggest that courts are not well-equipped at the pleading stage to accurately evaluate the merits of a particular claim. *See, e.g.*, Searle Civil Justice Institute, *Measuring The Effects of a Heightened Pleading Standard Under* Twombly *and* Iqbal vii (Oct. 2013) (finding no significant difference in summary judgment outcomes in employment discrimination cases after comparing pre-*Twombly* and post-*Iqbal* cases, while finding a modest improvement in quality in contracts cases); Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119 (2011) (providing empirical evidence suggesting that heightened pleading standards do not provide a better filter for weeding out meritless cases); *cf.* Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598, 600 (2007) (concluding that despite Congress's intent, PSLRA likely deterred the filing of a substantial number of meritorious cases). Moreover, there is grave concern that cognitive biases will exacerbate erroneous decision-making given the subjectivity of a broad plausibility pleading standard. *See, e.g.*, Jeffrey J. Rachlinski, *Processing Pleadings and the Psychology of Prejudgment*, 60 DEPAUL L. REV. 413, 414 (2011) ("The growing body of research . . . suggests that the new pleading standard . . . will have some unfortunate consequences.").

Iqbal, a given set of facts often lends itself to two or more plausible explanations; one might seem less likely to be true than another but still fall within the range of what is plausible. *See Sepúlveda-Villarini v. Department of Educ. of P.R.*, 628 F.3d 25, 30 (1st Cir. 2010) (Souter, J., sitting by designation) ("A plausible but inconclusive inference from pleaded facts will survive a motion to dismiss . . . ."); *Fabian v. Fulmer Helmets, Inc.*, 628 F.3d 278, 281 (6th Cir. 2010) (complaint survived motion to dismiss where inference that supported liability and inference that rebutted liability were both plausible); *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 185 (2d Cir. 2012) ("A court ruling on such a motion may not properly dismiss a complaint that states a plausible version of the events merely because the court finds a different version more plausible."); *Swanson*, 614 F.3d at 404 ("'Plausibility' in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not.").

Germane to this point, this Court has unanimously concluded that an allegation of materiality in the securities litigation context is plausible even though multiple inferences could be drawn from the facts. *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309 (2011). In *Matrixx*, the plaintiffs alleged that the defendant failed to disclose information about the potential health effects of its product, which investors arguably would have taken into account when making investment decisions. The defendants argued, in part, that plaintiffs' complaint was not plausible because there were no statistically significant studies demonstrating the alleged health effect. *Id.* at 1319. But the Court

held that the existence of other data was sufficient at the motion to dismiss stage even if it suggested, but did not establish, the adverse health effect. *Id.* at 1319-23. All that is necessary for plausibility pleading is that the complaint's allegations "suffice to 'raise a reasonable expectation that discovery will reveal evidence'" of liability. *Id.* at 1323 (quoting *Twombly*, 550 U.S. at 556).

The formulation adopted by *Twombly* and *Iqbal* – insisting that an alternative explanation be obviously more likely – does not completely avoid practical and logical difficulties, but it certainly minimizes them. It also best accords with Seventh Amendment doctrine. The Seventh Amendment requires that, in all cases that would have been tried before a jury at common law, the jury's role to determine facts be preserved. Obviously, to the extent that a court is making, at the pleading stage, a factual determination that is constitutionally committed to the jury, there are significant Seventh Amendment concerns.[4] Whether application of an *Iqbal*-type standard always results in serious Seventh Amendment issues is not necessary to address here, but a failure to limit the extent to which alternative explanations can result in dismissal of a complaint implicates Seventh Amendment boundaries.

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[4] For a more developed argument on these lines, see Kenneth S. Klein, Ashcroft v. Iqbal *Crashes Rule 8 Pleading Standards on to Unconstitutional Shores*, 88 NEB. L. REV. 261 (2009); Kenneth S. Klein, *Is* Ashcroft v. Iqbal *The Death (Finally) Of The "Historical Test" For Interpreting The Seventh Amendment?*, 88 NEB. L. REV. 467 (2010).

B. Even under Plausibility Pleading, All Reasonable Inferences Must Be Drawn in Favor of the Pleader.

Aspects of the petitioners' argument also suggest that, in assessing plausibility, this Court should disregard two foundational rules that have long governed motions to dismiss—namely, that reasonable inferences should be drawn in favor of the plaintiff, and that any basis for dismissal must be found on the face of the complaint.

As to the first, petitioners urge a crabbed reading of the respondents' complaint that ignores reasonable inferences that might be drawn from respondents' factual allegations and that support the plausibility of respondents' claims. For instance, petitioners ask this Court to downplay respondents' allegations that the Secret Service engaged in similar viewpoint discrimination in other instances involving the Bush presidency by drawing the negative inference that because those incidents may have involved different agents or different kinds of events they can have no bearing here. Pet. Br. at 49. But a very different inference is also reasonable, *i.e.*, that the number and variety of such incidents suggest a pattern or practice rather than isolated actions by a few rogue agents, and that inference favors respondents. Indeed, even if the evidence of prior instances of viewpoint discrimination ultimately is not admissible at trial, it can create grounds for a reasonable inference at the pleading stage. A complaint is not meant to prove a claim; it simply "raise[s] a reasonable expectation that discovery will reveal evidence" satisfying the elements of the legal claim. *Twombly*, 550 U.S. at

556; *see also Matrixx*, 131 S. Ct. at 1323 (quoting *Twombly*).

Not only has the government asked the Court to draw inferences adverse to respondents, but it also has reached beyond the four corners of the complaint to provide an account of plaintiffs' experience, substituting for the allegations in the complaint contentions made by petitioners as to the explanation for certain events. For instance, in asking this Court to disregard the allegation that petitioners had "no valid security reason" to evict respondents from their location, petitioners hypothesize various lawful explanations for why respondents were treated differently than other individuals. Pet. Br. at 42-45. At the motion to dismiss stage, however, these hypothetical explanations are irrelevant, unless they appear on the face of the complaint and are much more obvious than the respondents' explanation. Petitioners' implication that the Court may consider such explanations on a motion to dismiss is inconsistent with decades of pleading jurisprudence that was left unchanged by *Iqbal* and *Twombly*. Even under the heightened PSLRA standard, a court must look for alternative explanations that "one could draw *from the facts alleged*." *Matrixx*, 131 S. Ct. at 1324 (emphasis added). There is no room for substituting a movant's allegations for the allegations found in the complaint.

III. *Amicus Curiae*'s Proposed Standard for Plausibility Pleading Accords with the United States' Arguments in Other Contexts.

Amicus curiae notes that the standard proposed here is the same standard that the federal government has urged when litigating affirmatively and defending its own pleadings against Rule 12(b)(6) motions. This is illustrated by several examples taken from available filings made on behalf of the government.

First, the government has consistently argued in other contexts that *Iqbal* and *Twombly* do not change the basic function of pleading, which is to provide sufficient notice to the defending party so as to enable them to prepare a defense and file an answer. *See* e.g. EEOC's Mem. in Opp'n to Defs.' Mot. to Dismiss at 5-6, *EEOC v. Burlington Northern Santa Fe R.R.*, No. 2:12-cv-02634, 2013 WL 1397130 (D. Kan. Apr. 5, 2013); EEOC's Resp. Br. to Def.'s Mot. to Dismiss at 2-3, *EEOC v. Wells Fargo Fin. Mich., Inc.*, No. 2:10-CV-13517, 2011 WL 1690037 (E.D. Mich. May 4, 2011) (arguing that neither *Iqbal* nor *Twombly* changed the "liberal, notice pleading requirements of Rule 8(a)"); EEOC's Resp. in Opp'n to Def.'s Mot. to Dismiss at 2, 5, *EEOC v. Hobson Air Conditioning, Inc.*, No. 3:10-CV-00818, 2010 WL 3835553 (N.D. Tex. Sept. 28, 2010) (notice pleading is merely the first step along the pathway towards adjudication on the merits); EEOC's Opp'n to Defs.' Mot. to Dismiss at 3, *EEOC v. Chapman Univ.*, No. 3:11-cv-04845, 2012 WL 1831523 (N.D. Cal. May 8, 2012).

Second, and relatedly, the government has argued that to the extent "plausibility" is a criterion for sufficiency, a complaint need meet only a minimum standard to survive dismissal. *See* EEOC's Opp'n to Def.'s Mot. to Dismiss at 4, *EEOC v. Fair Oaks Dairy Farms, L.L.C.*, No. 2:11-cv-00265, 2012 WL 3096695 (N.D. Ind. July 27, 2012) (plausibility pleading sets up "minimal" and "easy to clear" hurdles (internal quotation marks omitted)); United States' Resp. to Burns Defs.' Mot. to Dismiss at 10, *United States v. Black Hills Tree Farm*, No. 5:09-cv-05049, 2011 WL 1044376 (D.S.D. Mar. 17, 2011), 2010 WL 5807830 (complaint requires only facts that are "suggestive of illegal conduct" even if their ultimate proof is improbable); EEOC's Opp'n to Def.'s Mot. to Dismiss etc. at 3, *EEOC v. Alia Corp.*, 842 F. Supp. 2d 1243 (E.D. Cal. 2012) (No. 1:11-CV-01549), 2011 WL 10631649 (an allegation is sufficient if it provides the defendant with enough "to admit, deny or state it is without knowledge of this fact."). On multiple occasions, the government has argued that there is no heightened pleading standard and that a complaint need not allege specific or detailed facts to survive a motion to dismiss. *See* EEOC's Opp'n to Def.'s Mot. to Dismiss Compl. at 2, *EEOC v. Global Horizons, Inc*, 904 F. Supp. 2d 1074 (D. Hawai'i 2012) (No. 11-cv-257), 2012 WL 10007946; EEOC's Mem. in Opp'n to Defs.' Mot. to Dismiss at 6, *Burlington Northern Santa Fe R.R.*, No. 2:12-cv-02634, 2013 WL 1397130; EEOC's Resp. in Opp'n to Def.'s Mot. to Dismiss at 12, *EEOC v. Scrub, Inc.*, No. 1:09-cv-4228, 2009 WL 3458530 (N.D. Ill. Oct. 26, 2009) (No 1:09-cv-4228), 2009 WL 4402605; EEOC's Resp. in Opp'n to Def.'s Mot. to Dismiss at 5, *Hobson Air Conditioning*, Inc., No.

3:10-CV-00818, 2010 WL 3835553; EEOC's Opp'n to Defs.' Mot. to Dismiss at 3, *Chapman University*, No. 3:11-cv-04845, 2012 WL 1831523.

Third, the government has acknowledged that under plausibility pleading all inferences are still to be drawn in favor of the pleader. *See* EEOC's Mem. in Opp'n to Defs.' Mot. to Dismiss at 6, 9, *Burlington Northern Santa Fe R.R.*, No. 2:12-cv-02634, 2013 WL 1397130; EEOC's Resp. Br. To Def.'s Mot. to Dismiss at 2, *Wells Fargo Fin. Mich., Inc.*, No. 2:10-CV-13517, 2011 WL 1690037 (arguing that neither *Iqbal* nor *Twombly* changed the "liberal, notice pleading requirements of Rule 8(a)"); EEOC's Opp'n to Defs.' Mot. to Dismiss at 3, *Chapman Univ.*, No. 3:11-cv-04845, 2012 WL 1831523.

And most importantly for purposes of the instant case, the government has recognized that this means that a court may not find a claim implausible because of alternative lawful explanations unless those explanations are found in the four corners of the pleading and are much more obvious than the inference the pleader asks the Court to draw. *See* EEOC's Mem. in Opp'n to Defs.' Mot. to Dismiss at 5, *Burlington Northern Santa Fe R.R.*, No. 2:12-cv-02634, 2013 WL 1397130 ("Only those plaintiffs that include in their complaints allegations so general that they encompass a wide swath of conduct, much of it innocent, . . . have not nudged their claims across the line from conceivable to plausible." (citations and internal quotation marks omitted)); EEOC's Opp'n to Defs.' Mot. to Dismiss at 4, *Chapman Univ.*, No. 3:11-cv-04845, 2012 WL 1831523 (arguing that plaintiff's complaint may only be dismissed when a "plausible alternative

explanation is so convincing that plaintiff's explanation is implausible" (internal quotation marks and citations omitted)); EEOC's Resp. in Opp'n to Defs.' Mot. to Dismiss First Am. Compl. at 12, *EEOC v. BassPro Outdoor World, LLC*, 884 F. Supp. 2d 499 (S.D. Tex. 2012) (No. 4:11-CV-03425), 2012 WL 1506103 (fact that defendants might be able to rebut allegations is not relevant); EEOC's Resp. in Opp'n to Def.'s Mot. to Dismiss at 10 n.6, *EEOC v. PBM Graphics, Inc.*, 877 F. Supp. 2d 334 (M.D.N.C. 2012) (No. 1:11-CV-805), 2012 WL 10027993 (stating that defendant could not argue at 12(b)(6) stage that "facts alleged by EEOC could more logically lead to the conclusion" that defendants behaved lawfully, because all inferences must be drawn in favor of plaintiff.).

Of course, the federal government is not prohibited from arguing out of both sides of its mouth with respect to the meaning of "plausibility." On the other hand, however, the government should not be seen as simply a private party in this respect. For a stable and legitimate pleading system, the rule adopted by this Court should not depend on whether the government appears before it as a litigant seeking affirmative relief or a litigant taking a defensive posture.

CONCLUSION

For the foregoing reasons, *amicus* urges the Court, if it reaches petitioners' second question, to clarify the pleading standard in a manner that is consistent with *Iqbal* and *Twombly*, that does not permit dismissal whenever a defendant's theory is at all "more likely" than the plaintiff's at the pleading stage, and that still requires courts to draw all

reasonable inferences in favor of the pleader. *Amicus* takes no position on the result that should be reached here under a proper Rule 8 analysis.

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